

(1970) 05 CAL CK 0006

Calcutta High Court

Case No: Applications in Suit No. 1260 of 1935

Mohamed Valli Patel

APPELLANT

Vs

Western Indian Oil Distributing
Co. Ltd.

RESPONDENT

Date of Decision: May 29, 1970

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 1, Order 21 Rule 50(2), Order 22 Rule 2, Order 30 Rule 1, Order 30 Rule 2
- Contract Act, 1872 - Section 45
- Limitation Act, 1963 - Section 21(1), 21(2), 22, 22(1), 22(2)
- Partnership Act, 1932 - Section 4, 42, 42(c), 46, 47

Citation: 74 CWN 1026

Hon'ble Judges: S.C. Deb, J

Bench: Single Bench

Advocate: Arya Mitra, for the Appellant; B.N. Sen and Ajoy Ghose and Amiya K. Basu as Amicus Curiae, for the Respondent

Judgement

S.C. Deb, J.

Four partners, in the name of their firm, commenced this action, 35 years ago, for enforcement of their alleged rights arising out of alleged rescission of several contracts mentioned in the plaint and, after the defence was put in, they did not want to disturb the slumber of the Court any more. One by one they went to eternal sleep leaving their burden on the shoulders of their respective legal representatives who, on, 4th February 1969, after making their joint application noted as made on that day, took out a Master's Summons on 5th February 1969, for recording the deaths of the partners of the plaintiff-firm and for consequential amendments of the plaint arising out of such deaths including the amendment of the suit-Register and for permitting them to prosecute this action. In the affidavit-in-opposition affirmed on 10th March 1970, as it was stated that the application was barred by the law of

limitation so another Master's Summons was taken out by the petitioners on 17th March 1969, for setting aside the abatement, if any, of the suit; for extending the time till 4th February 1969 to make the first application and for treating the first application as made within the prescribed period therefor and for admission of the first application and for allowing the petitioners to proceed with the first application.

2. In the petition filed in the second application it is stated that after going through the said affidavit-in-opposition the petitioners realised that they had made a mistake in computing the prescribed days for making the first application and so they were late by only one day which should be condoned u/s 5 of the Limitation Act.

3. These two applications were heard together for several days and at the request of the parties I gave them sufficient time to consider the important questions of law involved in these two applications and at my request the learned counsel Mr. A.K. Basu agreed to assist me in this matter and I acknowledge the able assistance rendered by him and the learned counsel appearing for the parties.

4. In the first petition it is stated that at the time of institution of the suit the plaintiff-firm was composed of the following partners:

(1) Habib Valli Patel.

(2) Abdul Rahman Habib Patel

(3) Mohamed Valli Patel and

(4) Amiji Valli Patel.

Learned counsel Mr. B.N. Sen appearing for the respondent at first said that as the certificate of registration does not show that Habib is a partner, his legal representatives ought not to be brought on record and then said that if this application is allowed on merits they may be brought on record without prejudice to this contention and this question may be tried as an issue in the suit.

5. Habib died in the year 1940. Abdul and Mohamed died one after the other in 1945 and in the meantime some of their legal representatives also died. On 5th November 1968 the sole surviving partner Amiji left this world for good.

6. In the first petition it is stated that as the suit was filed in the name of the firm it was not necessary to make any application for recording the deaths of the first three partners and now that Amiji has died so it has become necessary to make this present application.

7. Mr. Sen resisted these two applications by saying that on the death of the said three partners the right to sue accrued to their respective legal representatives u/s 45 of the Indian Contract Act and they should have applied under Order 30 Rule 4(2) of the CPC within the time prescribed by Article 176 of the repealed Limitation Act of 1908 and, not having done so, their right to apply is long time-barred. He further

contended that on the death of Amiji this suit can no longer be continued under Order 30 of the Code and in any event on his death this suit has partially abated so far as the first three partners are concerned and so the legal representatives of Amiji can no longer maintain this action in view of Section 45 of the Contract Act and lastly sections 42 and 47 of the Indian Partnership Act have no application in view of the statements made in the affidavit-in-reply.

8. To appreciate the above contentions of Mr. Sen it is necessary to set out below the relevant provisions of law" on which the fate of these two applications depend:

Section 45 of the Indian Contract Act:

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Order 30 of the Code of Civil Procedure:

Rule 1. (1) Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.

Rule 2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1) all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1) the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Rule 4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the

institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have- (a) to apply to be made a party to the suit, or (b) to enforce any claim against the survivor or survivors.

Indian Partnership Act:

Section 42 Subject to contract between the partners a firm is dissolved- (a) if constituted for a fixed term, by the expiry of that term; (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof; (c) by the death of a partner; and (d) by the adjudication of a partner as an insolvent.

Section 46. On the dissolution of a firm every partner or his representative is entitled as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights.

Section 47. After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise:

Provided that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

Section 48. In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed:

(a) Losses, including deficiencies of capital shall be paid first out of profit, next out of capital, and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:-

(i) in paying the debts of the firm to third parties;

(ii) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;

(iii) in paying to each partner rateably what is due to him on account of capital; and

(iv) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits.

Limitation Act, 1908:

Section 22. (1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

Article 176:

Under the same code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ninety days.	The date of the death of the deceased plaintiff or appellant.
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9. Before expressing any opinion on the above statutory provisions it is better to refer to a few cases cited from the Bar. In (1) Ram Narain Nurshin Doss v. Ram Chunder Jankee Loll, ILR 18 Cal. 86 where the suit was filed by two surviving partners in their own names without impleading the legal representatives of a deceased partner in respect of a cause of action arising out of a breach of contract during the life-time of the deceased partner a Bench of this Court on a Reference from the Court of Small Causes - unanimously held that the legal representative of the deceased partner was a necessary party to the suit in view of Section 45 of the Contract Act. This Reference was decided under the CPC 1882 which contained no provision like Order 30 Rule 4(1) of the present Code and so the judgment relied on

by Mr. Sen, has no bearing on the points involved before me and it is also distinguishable as that suit was not filed in the name of the firm.

10. Mr. Sen also relied on a Bench decision of this Court in (2) *Shital Chandra Bairagi v. Manick Chandra Hazra*, 13 CWN 509 where it was said that the joint creditors should enforce their rights jointly and if one of them is unwilling to be a co-plaintiff he should be made a proforma defendant. General principles laid down in this case cannot be disputed but this case was also decided under the old Code and moreover the plaintiffs there were not even the partners of any firm and this judgment stands on the same footing as that of the earlier decision.

11. In (3) *Balkissen Das Daga v. Kanhya Lal*, 17 CLJ 648 relied on by Mr. Mitra, an application was made on behalf of the defendant for dismissal of the suit on the ground that it had wholly abated and in any event it had partially abated so far as one of the plaintiffs was concerned. There, a partnership business was carried on by three plaintiffs and the suit was jointly filed by them in their names and not in the name of the firm and during the pendency of the suit one of the partners died and no application for substitution was made. It was contended, in support of that application, that as the right to sue was joint u/s 45 of the Contract Act so on the death of one of the partners the whole suit had abated. After discussing section 45 of the Contract Act and Order 30 Rule 4(1) of the Code including the above two decisions of this Court it was held by Fletcher J. at page 652 of the report as follows: "It seems to me the statutory order which has the force of statute modified section 45 of the Indian Contract Act and in the manner as it had always been interpreted in the High Courts other than the High Court in Calcutta. Therefore, the fact that one of the plaintiffs has died does not make the suit abated. There does not seem, so far as I can see, to be any authority in the construction of Order 30 Rule 4 but it seems to me the legislature did not intend Order 30 Rule 4 of the Code to apply only to cases where the suit was brought by or against a firm in the firm's name. The present application therefore is misconceived and must be dismissed with costs."

12. In (4) [Utanka Lal Mookerji Vs. Tarak Nath Seal and Others](#), , relied on by Mr. Mitra, the suit was filed in the name of the firm by three partners for enforcement of a mortgage executed by the defendant which was compromised and under the preliminary decree passed by consent, the decretal amount was payable by instalments. Several instalments were paid by the defendant and thereafter one of the plaintiffs died. An application was thereafter made, without impleading the legal representatives of the deceased partner, for final decree in view of defaults committed by the defendant in payment of instalments. It was contended on behalf of the judgment-debtor that as the legal representatives of the deceased partner was not brought on record the suit had wholly abated and so the application should be dismissed. The said contention was not accepted by this Court and at page 12 of the report it was held: "The compromise decree was with the firm and, therefore, under Order 30 Rule 4, Civil P.C., if one of the persons who was a member of the

firm died during the pendency of the suit it would not be necessary to join the legal representative of the deceased as a party to the suit; and therefore assuming that the suit was a pending suit after the compromise decree there is no question of abatement on account of the death of Kali Prasanna Seal" and at page 14 it was further held: "In this case two or more persons have sued in the name of the firm. There is nothing therefore which prevents the operation of Rule 4 and in that view it was not at all necessary that there should be any substitution of the legal representative of the deceased Kali Prasanna Seal in order to entitle the plaintiffs to obtain a final decree."

13. There is a difference of judicial opinion as to whether a suit is maintainable by the surviving partners when suing in their individual names and not in the name of the firm without impleading the legal representatives of the deceased partner in respect of a cause of action arising during the life time of the deceased partner in view of section 45 of the Contract Act.

14. I find in (5) Moolchand v. Mulchand, ILR 4 Lah 142 a Division Bench of the Lahore High Court held that the legal representative of a deceased partner is not a necessary party in such a suit but another Division Bench of the same High Court took a different view in (6) Hari Singh v. Karam Chand Kashi Ram, ILR 8 Lah 1.

15. I also find in (7) Motilal Bechardass v. Ghellabhai Hariram, ILR 17 Bom. 6 it was held by a Division Bench of the Bombay High Court that in such a suit legal representatives of the deceased partner is not a necessary party but a different view was expressed by another Division Bench of the same High Court in (8) Mathuradas Ganji v. Ibrahim Fazalbhoy, ILR 51 Bom. 986.

16. Unanimous view of Allahabad and Madras High Courts, as I see it, is that such a suit is maintainable in the absence of the legal representative of the deceased partner, but the High Courts of Nagpur and Madhya Pradesh have taken an opposite view as stated in (9) [Shrikrishan Moolchand Vs. Deokinandan Sardharam and Others](#), , relied on by Mr. Sen, but again the High Court of Madhya Pradesh in latter decisions held that the legal representative of the deceased partners are not necessary parties as noticed by a Full Bench of the Punjab High Court hereinafter mentioned.

17. In (10) [Gajanand Vs. Sardarmal and Another](#), , relied on by Mr. Mitra, three partners in their individual names filed the suit and one of them having died his legal representative not being brought on record it was contended that the suit had wholly abated which was not accepted by the High Court of Rajasthan. It was further held that under Order 22 Rule 2 of the Code the right to sue survived to the surviving plaintiffs.

18. In (11) [Dharamdas Gokaldas and Another Vs. Krishan Chand Hari Chand \(Registered\) Metal Merchants](#), , relied on by Mr. Mitra, a suit was filed in the name of the plaintiff firm and during the pendency of the appeal one of the partners having

died a contention was raised that the appeal had wholly abated as the legal representative of the deceased partner was not brought on record. There being two earlier conflicting decisions of the same High Court the matter was referred to the Full Bench and in delivering the unanimous judgment of the Full Bench I.D. Dua J. (as his lordship then was) held that the provisions contained in Order 22 of the Code have no application in view of Order 30 Rule 4(1) of the Code and the suit did not abate. Their Lordships of the Punjab High Court further agreed with the views expressed by this Court in (3) *Balkissendas's case* (supra) where it was said that section 45 of the Indian Contract Act was modified by Order 30 Rule 4 of the Code and the suit did not abate as it was not necessary to implead the legal representative of the deceased partner. Their Lordships further cited with approval the decision of this Court in (4) *Utanka Lal Mookerji case* (supra).

19. Difference of judicial opinion as stated above is solely confined to the cases where the suits are filed by the partners in their individual names and not in the name of their firm. But it is not necessary to express any opinion on this controversial question as the suit before me was filed under Order 30 Rule 1 of the Code in the name of the firm and not by the partners in their individual names.

20. All the High Courts, however, are of opinion that when a suit is filed in the name of the firm under Order 30 Rule 1 in respect of a cause of action arising during the life time of a deceased partner it is not necessary to bring the legal representative of the deceased partner on record and the suit does not abate in view of Order 30 Rule 4(i) of the Code.

21. There is no direct authority, however, on the legal questions involved before me and so to find out the principle upon which the first application should be decided it is necessary to see what has been said by the Supreme Court. In (12) [Purushottam Umedbhai and Co. Vs. Manilal and Sons](#), the Supreme Court said that "Rules 1 and 2 of Order 30 are enabling provisions" and when "a suit is filed in the name of a firm it is in reality a suit by all the partners of the firm" but these Rules "do not prohibit the partners of a firm suing in India in their names individually."

22. In (13) *Her Highness Madlasi Debi v. Ram Narain Pvt. Ltd.* AIR 1965 SC 1718 the Maharaja of Srimur and the appellants were the partners of a firm and they were sued in their firm name under Order 30 Rule 1 of the Code in which a decree was passed on admission and the decretal amount was directed to be payable by instalments. Defaults being committed in payment of instalments execution proceedings were started under Order 21 Rule 50(2) of the Code against the partners of the defendant firm other than the Maharaja. It was contended that the entire decree was a nullity on the ground that the permission to sue the Maharaja was not obtained from the Central Government as required by the Code. The Supreme Court held that the decree so far as it was against the Maharaja was a nullity but it was a valid decree against the other partners. In delivering the unanimous judgment of the Supreme Court Bachawat J. at pp. 1720-1721 said as

follows: "Mr. Andley relied upon the observations of Das J. in [Dulichand Lakshminarayan Vs. The Commissioner of Income Tax, Nagpur,](#) . that for the sake of convenience, Order 30 of the CPC permits a firm to sue or be sued in the firm name "as if it were a corporate body". Consistently with this legal fiction, Rule 3 permits service of the Summons on a partner or a person having control or management of the partnership business, Rule 4 permits the institution and continuance of the suit in the firm name in spite of the death of a partner before the institution or during the pendency of the suit without joining the legal representative of the deceased partner as a party to the suit, and Rule 9 permits a suit between a firm and one or more of its partners and between firms having one or more common partners. But the legal fiction must not be carried too far. For some purposes the law has extended a limited personality to a firm, but the firm is not a legal entity. Rule 1 shows that the individual partners sue or are sued in their collective firm name. Rule 2 provides that on disclosure of the names of the partners of the plaintiff firm, the suit proceeds as if they are named as plaintiffs in the plaint. Rule 6 provides that the persons sued in the firm name must appear individually in their own names. A suit by or in the name of a firm is thus really a suit by or in the name of all its partners.

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The suit against the firm is really a suit against all the partners who were its partners at the time of the accrual of the cause of action, including the dead partner. Order 30, Rule 4 of the CPC enables the creditor to institute the suit against the firm in the firm name without joining the legal representative of the deceased partner. The suit is, therefore, competent, but no suit can be instituted nor can a decree be obtained against a dead person. The decree passed in such a suit will, therefore, bind the partnership and all the surviving partners, but will not affect the separate property of the deceased partner."

23. Partnership is a creature of contract and it does not arise from status (vide Section 5 of the Partnership Act). Section 46 of the Partnership Act is not controlled by any agreement between the partners and it confers on every partner or his legal representative a legal right as against the other partner or his representative to have the properties of the dissolved firm applied in payment of debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their respective rights. Section 48 lays down the rules to be followed for such payments and distributions which are, however, subject to the contract between the partners.

24. Section 47 of the Partnership Act is not subject to any contract between the partners and it confers a legal authority on each partner but. not to their legal representatives to bind the firm after its dissolution so far as may be necessary to wind up its affairs and to complete the unfinished transactions at the time of such dissolution. Authority conferred on the partners u/s 47 of the Act must necessarily include the filing of a suit and its prosecution for realisations of debts and claims of

the dissolved firm for giving effect to the provisions contained in section 46 and 48 of the Act.

25. The CPC 1908 was passed "to consolidate and amend the law relating to procedure of the Courts of Civil Judicature" and the legislature, in its wisdom, has made section 45 of the Contract Act inapplicable to a suit filed in the name of the firm by the surviving partners under Order 30, Rule 4(1) of the Code keeping the rights of the legal representatives of the deceased partner fully preserved under Rule 4(2) of the said Order.

26. Order 30 Rule 4(1) enables the surviving partner not only to file a suit in the name of the firm without impleading the legal representatives of the deceased partner but also it confers a right on a sole surviving partner to prosecute a suit, if filed in the name of the firm, in the event of death of his other partner without joining his legal representative. When filing and prosecution of such a suit is permitted, in my opinion, the question of abatement of a suit, on the death of a partner during the pendency of the suit, can never arise if the legal representative of the deceased partner is not brought on record.

27. It is true that a suit filed in the name of the firm under Order 30 Rule 1 is a suit by all the partners but Rule 4(1) being a special provision it must necessarily exclude the operation of the general provisions contained in Order 1 and Order 22 of the Code so far as they relate to addition and substitution of parties in case of death of a partner and to this extent only I respectfully differ from the views of the learned Judges of the Rajasthan High Court and fully agree with the views expressed by the Full Bench of the Punjab High Court.

28. In my opinion, Article 176 of the repealed Limitation Act and the corresponding Article of the present Act cannot have any application in the event of the death of a partner in a pending action when such an action is brought under the provisions of Order 30 Rule 1 or Rule 4(1) of the Code. For all these reasons I am unable to accept the contention of Mr. Sen and hold that the suit has not abated on the death of the first three partners and Article 176 of the repealed Limitation Act including the corresponding Article of the present Limitation Act has no application in this case.

29. Subject to the contract between the partners a firm is automatically dissolved by the death of a partner u/s 42(c) of the Partnership Act. In other words, a firm will not be dissolved if the agreement between the partners expressly or by necessary implication extends its duration beyond the life time of a partner subject, however, to what are hereinafter stated. Anyone asserting the continuation of a firm notwithstanding the death of a partner must prove it by cogent evidence to the satisfaction of the Court as the law dissolves the firm on the death of a partner.

30. In the petition it is nowhere stated, as rightly said by Mr. Sen that "on the death of Habib or Abdul or Mohammed, the plaintiff firm was not dissolved". In the affidavit-in-opposition it was asserted that the plaintiff firm was dissolved on the

death of any one of them and in the affidavit-in-reply it was only stated that the petitioners will "crave reference to the terms and constitution of the plaintiff firm."

31. I find in (14) *Jatti v. Banwarilal*, 50 IA 192 the partnership firm of Rupchand and his brothers stood dissolved on the death of Rupchand but his brothers continued to carry on the business of the firm. Rupchand's widow filed a suit alleging that she was admitted as a partner in place of her deceased husband. The defendants denied the said assertion including the existence of the new partnership. In dismissing the appeal of the widow Lord Dunedin at page 195 of the Report said as follows: "It is possible to read the averments of the plaintiff as alleging such a partnership. But the existence of such a partnership was denied. The case went to trial, and not a scrap of evidence directly proving such an agreement was produced. All that the widow got was a mere allowance of Rs. 51 a month. The fact that Rupchand's share still continued to be dealt with in the books is no evidence of a partnership with his widow."

32. In spite of repeated opportunities being given the petitioners did not produce the agreement, if any, between the deceased partners. It is nowhere stated by them that the firm was reconstituted after the death of any one of the partners. Moreover it is nowhere stated by them that the plaintiff firm was not a partnership at will. It is further to be noticed that the petitioners did not even say that there was an oral agreement between the deceased partners that the firm would continue notwithstanding the death of any one of them. On the materials on record I hold that the plaintiff firm stood dissolved by the death of Habib, if he was a partner, and in any event, it stood dissolved by the death of Abdul, not to speak of by the death of Mohammed.

33. Assuming, however, that the plaintiff firm was not dissolved by the death of either Habib or Abdul and further assuming that after the death of those two partners, Mohammed and Amiji as the last two surviving partners, continued to carry on the business of the plaintiff firm, still the plaintiff firm stood dissolved on the death of Mohammed as the then partnership was between two partners only notwithstanding any express provision, if any, for its continuance because that is the law laid down, I find, by the Supreme Court in (15) [Commissioner of Income Tax, Madhya Pradesh, Nagpur and Bhandara Vs. Seth Govindram Sugar Mills](#), .

34. For all these reasons I am unable to accept the contention of Mr. Mitra that the plaintiff firm was not dissolved on the death of the partners and in the same way I am unable to accept the contention of Mr. Sen that Section 47 of the Partnership Act has no application to the facts of this case.

35. Section 4 of the Partnership Act provides that persons who have entered into partnership with one another are individually called "partners" and collectively "a firm" and the name under which their business is carried on is called the "firm name". "The firm is not a legal entity" but its factual existence cannot be denied.

Contract made in the name of the firm, in view of Section 4 of the Partnership Act, is a contract made by and with all the partners of the firm. Contractual rights and obligations of the partners in relation to third parties are governed by the Indian Contract Act. A promise made to a firm by a third party is a promise made by him to all the partners jointly and the right to claim performance of such a promise is vested jointly in all the partners u/s 45 of the Contract Act.

36. Right to claim performance of the contract on the death of one of the partners rests with his legal representative jointly with the surviving partners and similarly on the death of the surviving partners such a right rests with their legal representatives jointly with the representatives of the predeceased partner. The partners in their individual names can jointly file a suit for enforcement of the contractual rights. They are also entitled to sue in the name of the firm under Order 30 Rule 1 of the Code. A suit filed in the name of the firm is a suit filed by all the partners jointly. So long there is a surviving partner he is entitled to institute a suit in the name of the firm without impleading the legal representatives of the deceased partners u/Order 30 Rule 4(1) of the Code. If all the partners are dead then their legal representatives must join in a suit for enforcing the contractual rights of the deceased partners and if any one of them is unwilling to join as a plaintiff, he should be made a pro-forma defendant.

37. Order 30 Rule 4(1) as said before authorises the surviving partner to institute a suit in the name of the firm for realisation of the partnership debts without impleading the legal representatives of the deceased partner notwithstanding anything contained in section 45 of the Contract Act and though in such a suit the estate of the deceased partner is not at all represented still when the fruit of the decree is realised by the surviving partner it forms part of the assets of the dissolved firm and enures for the joint benefit of surviving partner and legal representative of the deceased partner and is liable to be distributed in accordance with the provisions contained in sections 46 and 47 of the Partnership Act.

38. When the law allows a suit to be filed in the name of the firm by the surviving partner alone without impleading the legal representatives of the deceased partner plea of non-joinder of parties cannot be available to the defendant in such a suit and in the same way if such a suit, if filed within time, it cannot be said that the claim of the legal representative of the deceased partner has become barred by the law of limitation due to his nonjoinder as plaintiff.

39. Order 30 Rule 4(2) contemplates a pending suit filed under Rule 4(1) in the name of the firm by a surviving partner without impleading the legal representatives of the deceased partner and it preserves the right of the legal representative to make an application for being added as a party in such a pending action. So long this right of the legal representative is not exercised in a pending action it is a pending right and it accrues from day to day and cannot, therefore, be said to be barred by any lapse of time.

40. It cannot be said that this suit is dead with the death of the last surviving partner viz., Amiji. During the death of Amiji the suit as originally constituted under Order 30 of the Code cannot be proceeded with in its present form as it has become defective but that does not mean that the legal representative of the deceased partner cannot be brought on record to prosecute the suit by making suitable amendments of the plaint. Rights of the litigants ought not to be lightly defeated and to preserve such rights the Court always takes into consideration the change of circumstances during the pendency of the suit specially when the litigants have no control over such a situation and death of a litigant being one of such circumstances the Court necessarily takes that event into account.

41. It cannot be said that when a legal representative of a deceased partner is brought on record in a suit filed in the name of the firm the character of the suit is changed nor it can be said that the old suit has been converted into a new suit: It is a continuation of a pending action by the legal representative commenced by the deceased partners.

42. In a suit filed by a surviving partner in the name of the firm under Order 30 Rule 4(1) the legal representative of the deceased partner is not a party and if during the pendency of the suit a legal representative is brought on record under sub-rule 2, it cannot be said that it is a case of addition of a new party as contemplated by section 22(1) of the repealed Limitation Act and the corresponding section of the new Act and in my opinion it is a case of devolution of interest during the pendency of a suit and an addition of party as contemplated by section 22(2) of the repealed Limitation Act and section 21(2) of the new Act. Similarly if a surviving partner or the sole surviving partner dies during the pendency of such a suit and then their legal representatives are brought on record it cannot be said that it is a case of substitution of parties within the meaning of section 22(1) of the repealed Limitation Act and section 21(1) of the present Limitation Act but it is a case of devolution of interest during the pendency of the suit and so section 22(2) of the repealed Act and the corresponding section of the new Act will apply.

43. Mr. Sen lastly contended that even if the legal representative of Amiji is allowed to prosecute this suit still the Court, in its discretion, should not permit the legal representatives of the first three deceased partners to be brought on record due to gross delay on their part in making this application. In my opinion, the Court has no such discretion in this matter as suggested by Mr. Sen but assuming that it has such a discretionary power still in exercising it, the Court must not arbitrarily take away their vested legal right unless the law debars them from enforcing it and I do not find any such law which has in any way adversely affected their right.

44. In those cases where the defendant had acquired a right due to a long lapse of time the Court must preserve that right, subject of course to the well-known exceptions which need not be repeated here, but in this case the defendant has not acquired any such right and so the delay on the part of those representatives by

itself is of no moment. Moreover, the Court should take into consideration the right of the legal representatives of Amiji who were not at all guilty of any such delay and if the legal representatives of the other partners are not allowed to come, the rights of the legal representatives of Amiji may be defeated in view of section 45 of the Contract Act and I find no principle upon which the course suggested by Mr. Sen can be adopted.

45. For all these reasons I am unable to make myself agree with the contentions of Mr. Sen and hold that due to the altered situations, as stated above, it has now become necessary to bring the petitioners on record and without prejudice to the contention of Mr. Sen that Habib was not a partner of the plaintiff firm which will be tried as an issue in the suit there will be orders as prayed for in prayers (a) to (e) of the Master's Summons dated 5th February, 1969. The amendments and the re-verification of the plaint shall be made within 14 days from today and the petitioners and the Department concerned shall act on the signed copy of the minutes and within three days thereafter the petitioners' solicitor shall write a letter to Mr. Sen's solicitor informing that the above directions have been carried out and shall annex with the said letter a copy of the minutes of this order and a copy of the amended plaint. Mr. Sen's client will be at liberty to file an additional written statement within a fortnight from the receipt of the said letter mentioned above and if such an additional written statement is filed Mr. Sen's solicitor will inform about this fact to Mr. Mitra's solicitor within three days from the date of its filing and shall supply a copy of the same to Mr. Mitra's solicitor. The parties are at liberty to disclose further documents, if any, by letters within 10 days from the last mentioned date and the inspection of those documents shall be completed within 10 days from the date of disclosures. Costs of filing of the additional written statements including the cost of discovery and inspection will be cost in the cause. Hearing of the suit is adjourned for two months from today. Certified for two counsel. There will be no order in the second application and the cost will be cost in the cause. Certified for two counsel.