

(1881) 03 CAL CK 0003

Calcutta High Court

Case No: None

Prosad Doss Mullick
and Others

APPELLANT

Vs

Russick Lall Mullick
and Another

Prosad Doss Mullick
and Others Vs Kedar
Nath Mullick and
Others

RESPONDENT

Date of Decision: March 17, 1881

Acts Referred:

- Contract Act, 1872 - Section 265

Citation: (1881) ILR (Cal) 157

Hon'ble Judges: McDonell, J; Field, J

Bench: Division Bench

Judgement

Field, J.

(who, after stating the facts of the case as above, continued):- Section 265 of the Contract Act is as follows: "In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representatives may apply to the Court to wind up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively." Then comes the following explanation:- "The "Court" in this Section means a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated."

2. Now, the first question which has been argued before us is, that the Court of the Subordinate Judge is not a Court inferior to the Court of the District Judge; but we think, with reference to the Bengal Civil Courts Act, VI of 1871, that this contention is wholly untenable. The Court of a Subordinate Judge is inferior to the Court of a

District Judge, at least in two important particulars. So far as regards suits of a certain value, that is suits not exceeding Rs. 5,000, the Court of the District Judge has an appellate jurisdiction over the Court of the Subordinate Judge. Then by the express provisions of the Civil Courts Act, Section 11, all the Civil Courts in the District, and therefore the Court of the Subordinate Judge, are subject to the control of the District Judge. We are, therefore, of opinion that the Court of a Subordinate Judge is inferior to that Court of a District Judge within the meaning of the above explanation.

3. Then it is argued, that the words "may apply " are permissive only, and that their effect is to give to the District Judge a concurrent jurisdiction merely ; but this argument assumes that, before the passing of the Contract Act, the jurisdiction provided by Section 265 of that Act existed, and could be exercised by some other Court or Courts than that of the District Judge ; but we think that this was not the case.

4. Undoubtedly the reports of cases decided before the passing of the Contract Act do show many instances in which members of business partnerships resorted to the Civil Courts, in order to have accounts and other matters settled between them by judicial decision; and in this, as in other matters, the selection of the Court was regulated by the pecuniary value of the subject-matter of dispute ; but we apprehend, that no tribunal existed out of the Presidency-towns which was capable of exercising the exact jurisdiction conferred by Section 265 of the Contract Act; capable, in other words, of dealing with partnership matters for all purposes contemplated by this Section. In the case of *Julius v. The Lord Bishop of Oxford* (L. R. 5 App. Cas. 214), it was held, that the words in a Statute "it shall be lawful," of themselves merely make that legal and possible which there would otherwise be no right or authority to do; that their natural meaning is permissive and enabling only ; a somewhat similar force may be given to the word " may;" and in this view the words " may apply" in Section 265 of the Contract Act create a new jurisdiction ; and if this is so, according to the usual rule, that jurisdiction must be exercised strictly in accordance with the provisions of the Statute which creates it. In other words, the jurisdiction created by the Section must be exercised exclusively by a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated. Let us then see what is the jurisdiction conferred by Section 265. It is a jurisdiction, first, to wind up the business of the firm ; secondly, to provide for the payments of its debts; and thirdly, to distribute the surplus according to the shares of the partners respectively.

5. The next question which arises is this. If, before the passing of the Contract Act, the Civil Courts other than the Courts of the District Judge had jurisdiction to deal with any one of these matters, has that jurisdiction been taken away in those cases in which the parties, who seek the assistance of the Courts, do not desire a settlement of all these matters ?

6. In the present cases there are distinct prayers that the first and third of the above objects may be carried out by the Court; and it is argued, that inasmuch as the plaintiffs do not ask that any provision be made for the payment of debts, the case does not require the exercise of the jurisdiction conferred by the Act; and there is, therefore, nothing to prevent the ordinary Courts, according to their respective limits of pecuniary jurisdiction, from entertaining and dealing with questions of accounts or other questions, arising between partners, for the settlement of which it is not necessary to carry out the whole of the three objects contemplated by the Section of the Contract Act.

7. Now, in the first place, it is a settled principle that a separate action by one partner against another partner will not lie unless the cause of action is so distinct from the partnership accounts as not to involve their consideration. In the present cases it is clear that the plaintiffs can have no relief without an adjustment of the accounts. Whether the plaintiffs are entitled to the sum of money claimed by them as a share of the profits or to any sum of money as profits, cannot be known until the whole of the partnership concerns and accounts have been fully examined. Even if there are no debts to be paid, it is necessary to consider the agreement under which the partnership was entered into, the amount of capital contributed by each partner, the share of the profits to which each is entitled, the sums which he has received, the losses and expenses, and other matters, before it can be settled what any member is entitled to have from the surplus. Then suppose that there are debts, it is true that the plaintiffs have not expressly asked that the debts of the firm may be discharged; but until those debts have been paid it is impossible to say that any portion of the money which may be found to be to the credit of the firm can be handed over to the partners as profits. It may well have been the intention of the Legislature that any remedy which the members of a dissolved partnership are entitled to claim through the medium of the Courts of Justice, should be subject to this condition, that all persons having just claims upon the partnership should have those claims fairly discharged.

8. With respect to the claim for damages, which is a very unusual claim, until the partnership accounts have been settled, it is impossible to know whether the Rs. 13,000, alleged to have been withdrawn from the business, was an unreasonably large sum to take in the shape of profits at the time when the amounts which make up this sum were withdrawn.

9. After the best consideration that we can give the subject, it appears to us, that it was the intention of the Legislature, in enacting Section 265 of the Contract Act, to create a new jurisdiction, to be exercised exclusively by the Court of the District Judge; and that, in the absence of a contract to the contrary, the members of a partnership, or their representatives, can have no remedy such as is asked in the present case, except by resorting to that Court, which is by the Section of the Act authorized to deal fully and finally with all questions, the settlement of which is

necessary in order to the complete winding up of the business of the firm.

10. We may observe in conclusion, that the presumption that the existing jurisdiction of a Court is not intended to be taken away unless express words have been used for that purpose usually applies only to the jurisdiction of the superior Courts. Unless the jurisdiction of a superior Court is expressly and clearly taken away, such jurisdiction will be presumed to continue. In the present case, the jurisdiction, which will be ousted if the Court of the District Judge is held to have exclusive jurisdiction in partnership matters, is the jurisdiction of Courts inferior to that of the District Judge ; and, as far as we are aware, the presumption to which we have above referred, is not usually applied in the case of such inferior Court.

11. Having regard to all the circumstances of this case, and to the fact that the provisions of the Section of the Contract Act are new, and of not unmistakably clear meaning, we think that the plaints in these cases should be returned for the purpose of being presented to the District Judge. The Subordinate Judge will follow the provisions of Section 57 of the CPC in carrying out this order. The plaintiffs must pay the costs of the defendants in this and the Subordinate Courts.