

MANU/BH/0033/1939

Equivalent Citation: AIR1940Pat204

IN THE HIGH COURT OF PATNA

Decided On: 15.09.1939

Appellants:**Banwari Lal and Ors.**

Vs.

Respondent:**Shaikh Shukrullah and Ors.**

Hon'ble Judges/Coram:

Mohamad Noor, Manohar Lall and Sankara Balaji Dhavle, JJ.

JUDGMENT

Mohamad Noor, J.

1. This and the analogous appeal (No. 60 of 1933) under Letters Patent are against a decree of a learned Judge of this Court in a suit for dissolution of partnership, for accounts and other incidental reliefs. The facts are as follows: The plaintiffs and defendant 6 who style themselves as Messrs. Nuri Mian & Co. are the owners of two sugar factories; one known as Nuri Sugar Factory is at Bhatni in the district of Gorakhpur in the United Provinces and the other named Deshi Sugar Factory is at Siwan in this province. The Bhatni factory is a composite one, that is to say, it manufactures sugar in the cane season directly from the cane and in other seasons by melting molasses, while the Siwan factory is a refinery and works with molasses only.

2. In about the year 1927 the owners were involved in financial difficulties and the factories had been mortgaged with the Imperial Bank of India. They therefore approached defendants 1 to 3 and father of defendants 4 and 5 for financial assistance. The negotiations culminated in two deeds, one a deed of partnership dated 15th October 1927, between the owners and defendants 1 to 3, and another an indenture between the owners on the one part and defendants 1 to 3 and father of defendants 4 and 5 on the other part and is dated 27th October 1925. It is not necessary to give here the detailed terms of these two deeds. So much of them as are relevant to the questions involved in this appeal will be stated at appropriate places. At present it is enough to state that defendants 1 to 3 and father of defendants 4 and 5 advanced to the plaintiffs and defendant 6 a sum of Rs. 5,75,000 at 9 per cent, per annum interest in order to enable them to pay up the dues of the Imperial Bank of India and other creditors.

3. The owners mortgaged the factories to them. It was arranged that the capital for the working of the factories would be supplied by defendants 1 to 3 as partners of the owners and that both the factories would be worked to their fullest capacities. The entire control of the staff and management was given to defendants 1 to 3 by the deed of partnership. It was arranged that the parties would share profit and loss half and half and out of the share of the profits of the owners three-fourths would go towards the liquidation of the mortgage debt, namely Rs. 5,75,000 and its interest and the remaining one-fourth of it would be paid to the owners. It was also arranged that owners would keep agents who would supervise the accounts and works of the factories. The arrangement was to last for five years; but if by that time the mortgage

money, namely Rs. 5,75,000 with interest, would not be satisfied it would continue till its satisfaction.

4. It appears that differences arose between the parties about the working of the factories, and on 6th October 1928, the plaintiffs instituted the present suit before the Subordinate Judge of Chapra. They alleged various acts of misconduct of the defendants and contended that in consequence of them which were in contravention of the agreement between the parties the partnership had come to an end and they asked for a declaration to that effect. In the alternative, they prayed that the partnership be dissolved. They also asked for accounts and claimed damages from the defendants for not working the Bhatni factory to its full capacity. They estimated that after taking the accounts it would be found that not only the mortgage debt of Rs. 5,75,000 and its interest had been satisfied but a sum of Rs. 6,00,000 was due to them and defendant 6 from the principal defendant. The learned Subordinate Judge passed a decree on 30th June 1930, which was partly preliminary and partly in my opinion final. He dissolved the partnership from that date, awarded the plaintiffs damages amounting to Rs. 24,750 for not working the Bhatni factory with molasses in the year 1925-26 and Rs. 6994-0-10 for not working it fully in the year 1927-28, in all Rs. 31,744-0-10. He ordered accounts to be taken and directed one Gurudayal Srivastava, who was the general manager of the factories under the defendants, to prepare accounts, and it seems clear that he appointed him receiver of the factories till the accounts are adjusted and also commissioner for taking accounts.

5. I may mention here that Mr. Srivastava was the manager of the owners before they entered into partnership with the defendants. He was appointed as such with the approval of the Imperial Bank of India with whom the factories were mortgaged.

While the accounts were being prepared and adjusted, the plaintiffs filed an application before the successor of the learned Subordinate Judge, who had decreed the suit, claiming that the receiver be directed to credit the owners with a sum of Rupees 42,483 being the loss which accrued to them by the defendants' not working the Bhatni factory with molasses in the year 1928-29. An objection was raised on behalf of the defendants that as this claim related to the period subsequent to the institution of the suit and was not covered either by the plaint or the decree, it could not be gone into at that stage.

6. The learned Subordinate Judge by his order dated 23rd May 1931, overruled this objection and proceeded to determine the claim on merits. The defendants came up to this Court in revision (Civil Revn. No. 332 of 1931) but the application was summarily rejected on 18th June 1931. The learned Subordinate Judge proceeded to hear the application and ultimately on 1st October 1931 directed that a sum of Rs. 42,483 as damages and Rupees 2000 as costs be credited in accounts on 1st November 1929, in favour of the owners. After this order was passed and while the account was still being adjusted, the case was called up by this Court to be heard in its extraordinary original civil jurisdiction, and was heard by the learned Judge who has passed the final decree.

7. In the meantime the receiver had submitted the accounts and the possession of the mills was given to the plaintiffs after they had given security for satisfaction of any decree which might be passed in the suit. Objections to the accounts were raised by the parties which were disposed of by the learned Judge by several orders and on 21st March 1933, he ordered a final decree to be prepared according to the directions given. This was done and after giving credit of Rs. 2,80,000 paid by the plaintiffs to

the principal defendants a decree was passed in their favour against the plaintiffs and defendant 6 for a sum of Rs. 19,975-9-2 of which a sum of Rs. 3683-4-6 was to bear interest at 9 per cent, per annum from 1st August 1933. It is against some parts of this decree that two appeals have been preferred, one by the defendants and the other by the plaintiffs. This appeal which is by the defendants is valued at Rs. 76,227-7-4 and is in respect of two items only. One is a sum of Rs. 31,744 which was ordered to be paid by the principal defendants to the plaintiffs in the decree passed on 30th June 1930, as I have already stated, as damages for not working the Bhatni Mill with molasses in 1925-26, and not working it fully in 1927-28.

8. The second is Rs. 44,483-6-6 (damages and costs) which the successor of the learned Subordinate Judge who decreed the dissolution of partnership ordered to be entered in the accounts of 1st November 1939, in favour of the plaintiffs for not working the Bhatni Mill with molasses in the year 1928-29. though therefore the appeal is nominally against a decree of a learned Judge of this Court in fact it is directed against two orders of the learned Subordinate Judge of Saran, one embodied in the preliminary decree and the other passed in the course of account taking.

It is obvious that in respect of the first item the appeal is not maintainable. A decree for it was passed on 30th June 1930. No appeal was preferred then and the question cannot be reopened now. The decree for this amount passed on 30th June 1930 was final. Even if it be treated as a preliminary one, Section 97, Civil P.C., is a bar to the present appeal.

9. In fact, this part of the appeal was not pressed before us. The only item, therefore, involved in this appeal is Rs. 44,483 which was ordered after the passing of the preliminary decree, to be entered in the accounts in favour of the plaintiffs. I have said that when the learned Subordinate Judge proceeded to hear the plaintiffs' application for assessment" of damages for not working the Bhatni factory with molasses in 1928-29 there was a revision application to this Court which was rejected on 18th June 1931. "When the learned Subordinate Judge passed the order complained of on 1st October 1931, there was a second revision application to this Court (C.R. No. 33 of 1932). It was heard under the revisional jurisdiction of this Court by the same learned Judge who has passed the final decree in this case, and although he was of opinion that the order of the learned Subordinate Judge was without jurisdiction and wrong he declined to interfere in revision and rejected the application on 3rd February 1932.

10. Later on, another attempt was made by the defendants before the learned Judge for recalling or reviewing the order of the learned Subordinate Judge; but he rejected the applications on 24th February 1932 (Misc. Judicial Case No. 144 of 1931). though again he was of opinion that the order of the learned Subordinate Judge was wrong he declined to re-call it on the ground that it was an order of his predecessor in office and could not be re-called under Section 151, Civil P.C. A Letters Patent Appeal No. 43 of 1932 Reported in (1938) 20 AIR Pat 189 against this order was dismissed on 29th November 1932. Therefore Rs. 44,483 remained credited in the accounts in favour of the plaintiffs.

11. It was contended on behalf of the respondents of this appeal that the order of the learned Subordinate Judge was a supplementary preliminary decree and the plaintiffs ought to have appealed against it, and they not having done so are precluded under Section 97, Civil P.C., from appealing against it after the final decree. No doubt there can be more than one preliminary decree in a suit, but the order of the learned

Subordinate Judge by which he directed that a sum of Rs. 44,483 be credited in favour of the plaintiffs in the accounts was an interlocutory order and not a decree.

12. The question whether a particular order is or is not a decree is sometimes difficult to decide. As has been pointed out by the Calcutta High Court in Peary Mohan Mookerjee v. Manohar Mookerjee MANU/WB/0055/1923 : AIR1924Cal160 , at one time the view of the Bombay High Court was that a decision that a suit is not bad for misjoinder or that it is not barred by limitation and other such orders were decrees. This extreme view was not accepted by the Calcutta High Court in Kamini Debi v. Promothanath Mukerjee AIR (1915) Cal 272 and was disapproved in the Bombay High Court itself in the Full Bench decision in Chanmalswami v. Gangadharappa MANU/MH/0110/1914 : AIR1914Bom149 . The difficulty is not in laying down the test but in applying it to a particular case. A useful test is whether the order conclusively determines the right of the parties with regard to any matter in controversy in the suit. It may be argued that an order that a certain sum be credited in favour of the plaintiffs in the adjustment of accounts conclusively determines the right of the plaintiffs in respect of that sum; but a closer examination of the position will show that it does not, because the right of the parties in controversy in the suit is as to how much one is entitled to get from the other.

13. An order directing this to be determined is a preliminary decree and an order which finally determines this is a final decree. But an order in the course of determination of the liability is not a decree but an interlocutory order. Take a case in which the Court does not think it necessary to appoint a commissioner for taking accounts. There is nothing in law to prevent it from taking account itself. In the course of taking accounts from day to day it passes orders that a certain sum be placed on the credit side and certain other on the debit side of the account.

14. Can it be said that these orders are preliminary decrees and the party against whom they are passed is to appeal against them at once? There will be in that case no end of appeals and the trial of the case will be indefinitely held up. Then take the case in which the Court thinks it necessary to give direction to a commissioner regarding the mode of partition after a preliminary decree for partition has been passed and partition is being effected by the commissioner, for instance, order fixing the value of different properties for the purposes of partition, etc. Can these orders, passed between the preliminary decree for partition and the final decree, be treated as supplementary preliminary decrees? If so, the partition itself will be held up for an indefinite period. In my opinion the orders passed for the guidance of the commissioner appointed for taking accounts or making partition or ascertaining mesne profits are not preliminary decrees. In this case what the Court did was to order the commissioner to credit the plaintiffs with a particular amount on a particular day in the accounts. This was an interlocutory order and did not conclusively determine the right of the parties.

15. Our attention has been drawn to an unreported decision of a learned Judge of this Court in Bankey Bihari Lal v. Mahant Ramprakash Das, C.R. No. 458 of 1926, Decided on 13th February 1928. In that case in the course of the ascertainment of mesne profits the Munsif had held that the defendants first a fourth parties were jointly and severally liable for mesne profits. The learned Judge held that the order was a decree and ordered the Munsif to draw up a formal one. First of all, that case is distinguishable from the present one inasmuch as there the liability of a particular set of defendants was finally decided. But with all respect to the learned Judge, I beg to differ from his view, as, in my opinion, the order was in effect an interlocutory one. A

preliminary decree had already been passed for mesne profits, and the liability of the defendants had already been determined. In the course of the ascertainment of mesne profits the Court had to find which among the defendants were liable and to what extent. At that time no sum was actually ascertained to be payable by the defendants.

16. It might have been that after the accounts were gone into nothing was found due from these defendants and there was no need for them to appeal again. I am clearly of opinion that the order of the learned Subordinate Judge was not a supplementary preliminary decree nor a final decree.

The next question for consideration is whether the learned Subordinate Judge had jurisdiction to pass the order that Rs. 42,283-6-6 be credited in favour of plaintiffs and defendant 6 in the accounts as their share of loss for not working the Bhatni factory with molasses in 1928-29 together with Rs. 2000 for the cost of the inquiry. Mr. Das for the appellants has contended that he had no such jurisdiction and has adopted for his argument the reasons given by the learned Judge of this Court while rejecting on 13th February 1932 the Civil Revision Application No, 33 of 1932. I have already said that the learned Judge was of opinion that the order was without jurisdiction and illegal. With my profoundest respect to his views, I regret I cannot agree with him. His first reason is that the claim for the aforesaid loss was not included in the plaint of the suit nor was it covered by the preliminary decree. The claim however refers to a period subsequent to the institution of the suit, and for obvious reasons could not have been included in the plaint.

17. It is true, as the learned Judge has pointed out, that the plaintiffs could have amended the plaint by including a relief in respect of this loss, but in my opinion there was no necessity for him to do so, and the investigation of the claims for the loss was covered by the suit and the preliminary decree for accounts.

The plaintiff's suit was for dissolution of partnership and accounts. Their case was that the partnership had already come to an end. This position was not accepted by the defendants. Prior to the institution of the suit the plaintiffs gave to the defendants a notice intimating to them that the partnership had come to an end. The defendants in their reply which they sent through Mr. Iqbal Ahmad stated that according to them the partnership had not ended and insisted upon carrying on the work of the partnership. This was also their attitude in the suit. The Court by its decree dissolved the partnership not from the date of the suit but from the date of it, i.e. 30th June 1930. The decree has become final. Neither party appealed against it.

18. We have therefore to give effect to it for better or for worse. The decree specifically ordered the accounts to be taken from 1st December 1926 till the date of the dissolution. The dissolution was decreed on the ground of misconduct of the defendants. If the misconduct continued during the pendency of the suit, I see no reason why the plaintiffs cannot get relief for it in the course of the adjustment of the accounts and why they should be forced to institute a separate suit. The misconduct was continuous and all losses to the partnership by the misconduct of the managing partner must be taken into account when the account is being taken for winding it up. Supposing the loss was caused at a time when there was no opportunity for the amendment of the plaint, can it be said that the plaintiffs are not entitled to relief and must institute a fresh suit after the final adjustment of the accounts? I doubt if such a suit would have been maintainable.

19. In my opinion the order of the learned Subordinate Judge which is complained of, shorn of technicalities, was in substance an order that the accounts should be taken not only of what was actually received by the partnership but also of what, was lost to it on account of the wilful neglect of the defendants who were the managing partners. Instead of directing the commissioner to prepare accounts on that basis, he himself determined the loss and directed it to be entered in the accounts. Whether or not there was wilful neglect by them and whether the plaintiffs are entitled to saddle them with the loss incurred to the partnership on account of not working the Bhatni Factory with molasses in 1928 and 1929 are quite different matters, and I shall deal with them later. At present I am concerned with the question whether the learned Subordinate Judge had after the passing of the preliminary decree, jurisdiction to order that the account should be taken on a certain basis.

20. The order was about the mode of taking account, and such an order, in my opinion, can be passed after the passing of the preliminary decree. This was the view taken by the Calcutta High Court in Peary Mohan Mookerjee v. Manohar Mookerjee MANU/WB/0055/1923 : AIR1924Cal160 . In that case after the passing of the preliminary decree for accounts the Court passed a further order determining the period and the mode of accounting. The Calcutta High Court held, that the Court had jurisdiction to do so. In that case the order was held to be a second preliminary decree in the suit. I have already held that in my opinion such an order is an interlocutory one and not a second preliminary decree. But if it be taken to be a second preliminary decree the position of the appellants will become worse. In that case they will be debarred from raising the question at this stage, not having appealed against it then.

21. The learned Judge of this Court has expressed his dissent from the view taken by the Calcutta High Court in the case above referred to; but with all respect to him I venture to say that, in my opinion, the case was correctly decided. Whether the order is justified on facts and law is a different matter and does not affect the question of jurisdiction.

Now the question arises whether in taking the accounts ordered by the preliminary decree the loss incurred during the pendency of the suit can be included if it be established that it was caused by the wilful neglect of the defendants. The learned Judge of this Court was of opinion that it could not. Now if the account is to be adjusted up to the date of the dissolution of partnership it can only be done on the basis of the deed of partnership. There can be no other basis. That deed provided that the defendants as managing partners would work the factory up to its full capacity and provide capital for it. They had full control of the business. They admittedly did not work the Bhatni Factory with molasses in 1928-29. If they omitted to do so deliberately, they are liable for the loss of profit to the plaintiffs. No doubt a partner is not a trustee for another partner and ordinarily he is not liable for not working, and it may be contended that the accounting should be only of what has actually been received and not what was lost to the partnership on account of the neglect. But here the partnership was of a peculiar kind. Along with the partnership there was a mortgage.

22. The two went together. Defendants themselves treated them as part of the same transaction. The partnership has been referred to in the mortgage deed. More than once it is mentioned that the mortgage is created under the pursuance of the partnership deed and in consideration of Rs. 5,75,000 to be paid by the mortgagees (the defendants and Kanhya Lal) to the plaintiffs and defendant 6. The partnership

deed specified that out of the profits which would accrue to the plaintiffs three-fourths would go towards the liquidation of the mortgage debt. It is clear that the mortgagees agreed that the mortgage debt would be liquidated in a particular way, namely by working the factory from the capital to be advanced by the defendants alone. They also agreed that the factory would work to its fullest capacity. The working of the factories to their full capacities was provided for the speedy satisfaction of the debt from the profits. The plaintiffs' case was that not only the mortgage debt has been satisfied but Rs. 6,00,000 would be found due to them.

23. The plaintiffs' contention was that the mortgage was a simple one, while the defendants contended that it was a usufructuary mortgage or that it was an anomalous mortgage. The contention of the plaintiffs prevailed and the learned Subordinate Judge held that it was a simple mortgage. In these circumstances, the best course would have been to take the account purely on the basis of partnership and to leave the defendants free to enforce their mortgage in Court and in that case it would have been open to the plaintiffs as defendants of the mortgage action to put forward a counterclaim that a certain amount which was lost to them through the default and wilful neglect of the mortgagees should be credited towards the satisfaction of the mortgage debt. But this was in fact not done. A simple money decree for the unsatisfied mortgage debt has been passed in favour of the defendants. Account was being taken not only for the winding up of the business but also for adjusting the mortgage-debt. It will therefore, be unjust and entirely inequitable to ignore the claim of the plaintiffs when the defendants have been allowed a decree to realise their mortgage money. If the rights and liabilities of the parties are being adjusted finally in this suit, the plaintiffs' claim for non-working of the factory according to the terms of the contract must be considered in the course of account taking.

24. It may be argued that Clause 3 of the partnership deed which is relied upon by the plaintiffs, became inoperative on account of the institution of the suit. I am, however, unable to agree to this proposition. As I have said before, the defendants never denied their position as partners according to the deed and went on working the factory during the pendency of the suit. If they asked and this Court granted them the relief of the realization of the mortgage money without the institution of a suit, they cannot now turn round and say that the relief for which the plaintiffs may be entitled to for not working the factory should not be considered. Furthermore, the plaintiffs never took the plea that they were not bound to carry on the partnership business. On the other hand, they took the plea that their action was bona fide and that they did not work the factory as they believed that there would be no profit. Then it cannot be said that a managing partner who has undertaken to supply the capital and work the business can never be liable for loss of profit due to his wilful neglect bearing in mind the fact that interest was running in their favour on the debt advanced by them to the defendants and the staff of the factory was being paid uselessly.

25. The learned Subordinate Judge who passed the preliminary decree for account and allowed damages to the plaintiffs relied upon a passage in Lindley on Partnership

Before the Partnership Act, 1890, was passed, if a partner was guilty of a breach of his duty to the firm, and loss resulted therefrom such loss fell on him alone. As was said by the Court in *Bury v. Allen* (1845) 1 Coll CC 589 :

Suppose the case of an act of fraud, or culpable negligence, or wilful default

by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect.

26. Here if the omission by the defendants to work the factory with molasses and supply capital for it was wilful and without any excuse it was a breach of a duty which the partnership imposed upon them and they must compensate the partnership for it. It was held by this Court in *Sasti Kenkar v. Man Gobinda* MANU/BH/0077/1919 : AIR1919Pat386 that if a partner is guilty of gross negligence or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby. Section 257 of the Contract Act, which was in force then, provided that partners are bound to carry on the business of the partnership for the greatest common advantage and to be just and faithful to each other. Therefore not supplying the capital as undertaken and not working the factory according to undertaking wilfully and without any excuse is not acting faithfully. Then the defendants were managing partners and as such were agents of the partnership and under Section 212, Contract Act, are liable to compensate the partnership in respect of direct consequences of their own neglect in not working the factory which they had undertaken to work.

27. Mr. Das has relied upon the decision in *Mahadev Vithu v. Ganoo Changoo* MANU/MH/0018/1925 for the proposition that in a suit for account upon a dissolution of partnership one partner is not liable for the probable loss sustained by the firm owing to the neglect or failure of such partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business. The head-note is rather misleading. The wide proposition contended for cannot be deduced from the judgment of the Court. Their Lordships of the Madras High. Court referred to the passage from Lindley on Partnership, which I have quoted above. But they disallowed the claim for loss on account of a partner not plying boat on hire as there was no proof of culpable negligence. They observed as follows: "But it cannot be said that the defendant has been guilty of fraud, culpable negligence or wilful default." It is clear therefore that the case was decided on the facts of its own and that wilful neglect was not proved in that case. The next case relied on by Mr. Das was *Cragg v. Ford* (1842) 62 ER 889. In my opinion the ratio decidendi of the case helps the plaintiffs. In that case the partnership was dissolved. It was agreed that the defendant should undertake the business of winding up the affairs of the firm.

28. He made delay in selling a certain quantity of cotton which caused loss to the firm. It was held that the loss could not be saddled on the defendant alone. The Vice-Chancellor (Sir J.L. Knight Bruce) said:

The plaintiff was, I conceive, entitled to have the cotton sold sooner than it was, and sold at a time when the loss would have been wholly or to a great extent obviated.

The case was decided on the basis that if the defendant defaulted the plaintiff could have himself taken steps to have the cotton sold; but this is not the case here. The defendants were in sole possession of the factories. They alone were to find the capital. The suit for dissolution was pending and though the plaintiffs alleged that the partnership had come to an end the matter was still subjudice. The defendants were working the factories and maintaining the position that the partnership continued. It was impossible for the plaintiffs to have worked the factory with gur.

29. Then again there the default in the sale of the cotton was after the partnership had come to an end. But in this case the default of the defendants was at a time when according to the decree of the Court the partnership continued.

Mr. Das also relied upon the decision in *Janaki Nath Ray v. Asad Raza* MANU/BH/0079/1935 It was held in this case that if a mortgagee takes possession of the mortgaged property as an agent of the mortgagor under a power of attorney this would not have the effect of making him a mortgagee in possession, and, therefore, he was not accountable on the footing of wilful default but on the basis of actual receipt by him. In the present case as I have said, the learned Subordinate Judge who passed the preliminary decree has held that the mortgage of the factory in favour of defendants 1 to 3 and father of defendants 1 to 5 was a simple mortgage. It was, therefore, contended that the accounting could only be on the basis of what was actually received; but as I have said before the position of the defendant was not only that of a simple mortgagee but also of partners who had undertaken to work the factory with their own capital and realize the principal and interest of the mortgage by the profits of the business.

30. A mortgagee who takes possession under a power of attorney is in a quite different position. The power of attorney can be cancelled any moment and the mortgagor may assume possession of the property. But in this case under the terms of the partnership deed and of the mortgage taken together it was not open to the plaintiffs to take possession of the mortgaged properties. The partnership was to continue till the mortgage was satisfied. In my opinion the principle laid down in the case above referred to cannot be applied to the facts of this case.

I now come to consider the question whether there was wilful neglect and misconduct on the part of the principal defendants in not working the Bhatni Factory with molasses in 1928-29. It was contended that the petition filed by the plaintiffs on 27th April 1931, asking the Court to award compensation for the loss incurred by the defendants for not working the factory in the year in question with molasses, does not disclose either fraud or misconduct. But the petition was filed in the suit itself and must be read along with the plaint in which there is a definite allegation of misconduct of the defendants in not working the same factory with gur in previous years.

31. In para. 6 of the petition the plaintiffs stated that the non-working of the Bhatni Factory with molasses by the defendants in the year in question was deliberate and illegal and was in contravention of the express terms of the deed of partnership. No doubt the word "illegal" may mean anything but read along with the plaint, it clearly means that it was in contravention of the definite undertakings given by the defendants in the partnership deed. In my opinion, the pleadings (if the petition of the plaintiffs and the objection of the defendants may be called so) clearly raise the question of the misconduct. The plea of the defendants was that they acted in good faith as they honestly believed that the working of the factory with molasses would not be profitable. The learned Subordinate Judge was therefore perfectly entitled to enter into the question of the bona fides of the defendants. In fact, the learned Judge in the judgment of the civil revision case above referred to is also of the opinion that the defendants themselves having invited, the Court to decide whether their omission to work the factory in the year in question was bona fide or otherwise the Court was justified in deciding it.

32. Now, the learned Subordinate Judge, after working the figures, has come to the

conclusion that had the factory worked there would have been a profit of more than a lakh of rupees to the partnership and this was lost. It is true that we cannot decide, as the learned Judge has remarked, *ex post facto*. We must place ourselves in the position of the defendants in about November 1928 to February 1929 when molasses had to be purchased. The learned Subordinate Judge is perfectly right when he holds that the defendants must be judged with the standard of a prudent man of business and we have to see what such a man would have done taking into consideration the prospect of the price of sugar and the price of the molasses then prevailing. It is not correct to say that he has decided the case on the basis of what eventually happened, but on what a prudent man of business has done provided that the capital of about Rs. 6,00,000 was available.

33. I shall deal with this aspect of the question when I come to the figures of the learned Subordinate Judge. But before I deal with it, I have to dispose of another objection of Mr. P.R. Das and that was that the defendants asked' the advice of the plaintiffs which was withheld, and thereafter the defendants exercised their own discretion and the Court cannot question their discretion. But the Court must see whether the omission to work was in honest exercise of discretion or whether it was simply to avoid putting in the capital.

Exhibit A (1) is the letter of Mr. Gurdoyal Srivastava to Messrs. Kishorilal Mukundlal in which the writer describes the conversation which he had with the plaintiffs' men in connexion with the working of the factory in 1929. Ex. A (3) is its office copy. Ex. A (2) is the letter which was sent by the defendants to the plaintiffs along with a copy of Mr. Srivastava's letter to them. It is dated 17th February 1929. This letter which was registered was not accepted by the plaintiffs and was received back by the defendants. It was produced unopened in Court when it was opened and was exhibited without objection. In Ex. A(1)(copy of Ex. A(3)) dated 16th February 1929 Mr. Srivastava informs the defendants that in obedience to their order he saw the plaintiffs' men Shaikh Khuda Baksh once before (of which the date is not given) and again on 25th January 1929, in connexion with the working of the Bhatni Factory with gur. He says that he explained to him that the rates of Java sugar from the time up to January, February and March 1930 would be Rs. 9-4-0, Rs. 9-5-0 and Rs. 9-6-0 and that he inquired of him whether under the circumstances he wanted the factory to be worked.

34. Khuda Baksh replied that as the suit was pending he was unable to give any definite answer. Srivastava however gathered from the conversation that the view of Khuda Baksh was that whether the work be continued with gur or not the result would be the same, because if the working with gur be stopped the staff of the mill would have to be retained all the same.

It is much better that loss should be suffered by working the factory than by paying the staff without work. Srivastava proceeds that thereafter he went to Siwan and met plaintiffs' men Muhammad Habib and others. The result was the same. They said that they would not give any reply privately because there was litigation. It was open to the defendants to get the matter adjudicated in Court. Otherwise they should do what they think fit. They added that though there was no hope of profit in making sugar from gur, yet if the work was to be done efficiently and economically the expenditure on the staff might be met, and if there was any rise in the price there was a chance of there being profit also.

35. This letter of Srivastava was sent by the defendants along with their own letter

Ex. A(2) under a registered cover which obviously was not accepted by them and was returned to the defendants and the envelope was produced unopened in Court. This letter also speaks of a previous letter having been sent to the plaintiffs by the defendants. This letter is No. 13/29 and is dated 26th January 1929. Habib for the plaintiffs denies having received either of the two letters. But the receipt of the January letter has been proved by the Dak book, though this letter has not been exhibited. I also believe that the plaintiffs received the registered letter but refused to accept the cover. We may therefore take it that the defendants made enquiries from the plaintiffs and they did not indicate definitely what they wanted the defendants to do and left the matter to their discretion.

36. Therefore if the defendants exercised an honest discretion, the matter ends there, and the plaintiffs are not entitled to any compensation. But if, on the other hand, as I shall presently show, they did not work the factory simply to avoid putting any capital in it in spite of the fact that profit was expected and caused loss not only of the profit but also of the payment of the staff which admittedly was about Rs. 25,000 they are liable. Mr. Mitter on behalf of the appellants drew our attention to a passage in Lindley on Partnership, Edn. 10, at p. 560, which runs as follows:

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a Court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

37. This remark, in my opinion, has no application to the facts of the case. It is true, as I have held, that the plaintiff did not accept the registered letter of the defendants and did not reply to the letter of 26th January 1929, which I have held must have been received by them. But it is clear from the letter of Mr. Srivastava to the defendants Ex. A(1) and copy Ex. A(3) that though on account of the pending litigation Khoda Baksh or Habib did not give definite direction to the defendants they nevertheless clearly expressed their desire that the factory should be worked with gur. It cannot be said that the plaintiffs unfairly left the defendants to their resources. Clause 3 of the partnership deed runs as follows:

It will be binding upon the second party (i.e. the defendants) to run the two factories every year with the entire proceeds of the sugar cane and molasses season. If at any time owing to the unfavourable market the rate of molasses be such as may yield no profit in the manufacture of sugar from molasses, in that case the work of manufacturing sugar from molasses could be stopped in consultation with the parties. The said factories shall not be closed in any other case.

38. Therefore, working the factories with gur was the normal condition which can only be departed from with the consultation of the parties if no profit was expected. No doubt the plaintiffs, as I have found, withheld their definite opinion from the defendants but nevertheless the second condition must be present, i.e. that profit should not be expected. If, as I shall presently show, the condition was such that enormous profit was expected the defendants had no option of stopping the work. I now come to consider what was the condition of price prevailing at the time when the

decision had to be taken whether or not the factory should be worked with gur. The factors which are to be taken into consideration and which the learned Subordinate Judge has considered are the price of gur, manufacturing cost, out-turn of sugar, its price and the sale proceeds of by-product, the molasses. In this connexion Mr. Das has questioned only the price of gur and the price of sugar as held by the learned Subordinate Judge.

39. The rest has been accepted. The cost of manufacture has been taken by the learned Judge to be Rs. 1-1-4 per maund, though the plaintiffs in their petition had themselves stated it to be Rs 1-2-0 per maund. This slight difference in the cost of working will not be material if the purchasing price of gur and the selling rate of sugar be proved according to the calculation of the Subordinate Judge. According to the calculation of the learned Subordinate Judge the net profit would have been Rs. 1,06,374-12-0 and the plaintiffs' share of it would be Rs. 53,187-6-0; but he has allowed them only Rs. 42,486-6-6 which was the amount claimed by them. So there is still a margin of about Rs. 11,000 in the plaintiff's share of profit and Rs. 22,000 in all and that will be more than enough to wipe out the slight difference in the working cost as mentioned by the plaintiffs and as found by the learned Subordinate Judge, and I will not deal with it at all. I shall, therefore consider whether the price of gur and the selling rate of the sugar as found by the learned Subordinate Judge to have prevailed when the decision has to be taken is correct.

40. The selling rate of sugar taken by the learned Subordinate Judge for the basis of decision is Rs. 9-10-6 per maund. Mr. Das questioned this figure. But in my opinion the conclusion of the learned Subordinate Judge is correct. It is the admitted case of both the parties that the price of Indian manufactured sugar depends upon the price of the Java sugar. The price of Java sugar at Calcutta is mentioned in Ex. H and is also mentioned in a cutting of "Amrita Bazar Patrika" dated 25th January 1929, which was enclosed in the defendants' letter No. 30-29 to the plaintiffs, dated 26th January 1929. The manufacture of sugar from gur at Bhatni was to commence some time in about May or June as till then the factory was working with cane. The cutting from the "Amrita Bazar Patrika" shows that the forward rate for July to September was Rs. 9-7-0. Ex. H also supports this where the price is mentioned as Rs. 9-5-0 for July and September and Rs. 9-6-0 for October and December. In Srivastava's letter to the defendants also the price mentioned is from Rs. 9-4-0 to Rs. 9-6-0 up to January, February and March 1930. Therefore, in my opinion the learned Subordinate Judge is not wrong when he has taken the price of Java Sugar at Calcutta at Rs. 9-6-0.

41. Now it is the admitted case of the parties that the price to be taken into consideration is of Cawnpore. The railway freight from Calcutta to Cawnpore being Re. 1-4-0 per maund, the learned Subordinate Judge has rightly taken the price of Java sugar at Cawnpore at Rs. 10-13-0 adding three annas per maund for the middleman's profit. It is also the admitted case of the parties that the Indian sugar must be offered at 8 annas per maund less than the price of the Java sugar. Therefore, the price of Indian sugar must be taken to be Rs. 10-5-0. The freight from Bhatni to Cawnpore being 8 or 9 annas per maund must be deducted from it. Therefore, the price at Bhatni comes to Rs. 9-12-0 or Rs. 9-13-0 per maund. In fact, the Siwan sugar was sold at the factory at Rs. 9-12-6 per maund. The learned Subordinate Judge if he has erred at all has erred in favour of the defendants when he has taken the rate at Rs. 9-10-6. Nothing has been urged to show that he is wrong.

42. I now come to the price of gur. The learned Subordinate Judge has taken it to be

Rs. 4-2-3 per maund. Mr. Das contended that the price ought to have been taken at Rs. 4-3-3. He referred to Ex. D (cash book of Siwan) which shows the price at which gur was purchased there. The rates varied from Rs. 4-7-0 to Rs. 4-2-6. But it is clear from the entries on the left hand side that for some reason or other the sellers were not being paid full price. Some deductions were made from the price which was entered on the credit side. We have, however, got definite evidence of the defendants' witness, Mr. Srivastava that in fact at Bhatni 17,696 maunds of gur was purchased for that mill for Rs. 72,364-7-0, which was ultimately transferred to Siwan. The average rate comes to a little less than Rs. 4-2-0 per maund. Therefore, when the learned Subordinate Judge has fixed it at Rs. 4-2-3 he has been overcautious. The plaintiffs' figure was Rs. 4-1-3 per maund.

43. On the whole, I am satisfied that the basis of the calculation of the learned Subordinate Judge is correct, and these facts must have been obvious to the defendants at a time when they had to take a decision.

It may, however, be argued that if such a large profit was expected why the defendants did not work the factory with gur. The reason is obvious. The defendants had several other businesses and a capital of about Rs. 6,00,000 was needed to work the Bhatni Factory with molasses. They were not willing to put in this capital. It appears that for this reason they did not work this factory with molasse³ in the year 1925-26 and did not work it fully in 1927-28 for which the learned Subordinate Judge who passed the preliminary decree awarded compensation to the plaintiffs.

44. The defendants did work the factory with molasses in 1926-27 when there was loss. But the judgment of the learned Subordinate Judge shows that this loss was due to bad work. In Exs. 3a (8a)(not printed), dated 29th April 1928, the plaintiffs definitely accused the defendants of not putting sufficient capital in the business. They say:

But in reality you did not want to stock gur nor do you want to lay out proper amount of money in this business. These matters are wholly against the ekarnama dated 15th January 1925 and you are responsible for all our past and future losses which are due to your manner of working.

A few lines before the plaintiffs further said:

Besides in working with gur it is necessary to have full stock in which it is necessary to spend sums of money and you do not want to lay out enough money.

45. In working with cane the capital is not locked up. The factory goes on buying cane and simultaneously manufacturing sugar and selling it. But while in working with molasses it had to purchase during the cane crushing season which is from November till April and stock it for several months. The money is locked up and the manufacture commences in June and then the sugar is sold. Therefore, it seems that throughout this unhappy partnership the defendants all along tried to avoid working with gur. Of course, they did work at Siwan with gur, because it was simply a refinery and could not be worked with cane. On the whole, in my opinion the order of the learned Subordinate Judge is correct and I would dismiss this appeal with costs.

Manohar Lall, J.

(After stating the facts, his Lordship proceeded further.) It is now necessary to state

that circumstances which are relied upon by the plaintiffs in order to claim the relief which they have fixed at Rs. 42,483-6-6 as damages for non-working of the gur after the institution of the suit. The plaintiffs, as stated already, rest their case upon

the deliberate and illegal non-working by the defendants of the Bhatni Factory with gur in contravention of the express terms of the deed of partnership and without the consent and approval of the members of Noori Mian & Co. as laid down in the deed (see para. 6 of the petition of 27th April 1981.)

46. In the absence of any other details given in this petition or in the rejoinder petition filed on the 9th May 1931 it is clear to my mind that the plaintiffs seek relief by reason of their allegation that the defendants have contravened the express terms of the deed of partnership (undoubtedly referring to Clause 3). No case of fraud or dishonesty could be allowed to be gone into upon this pleading because of, as pointed out by their Lordships of the Judicial Committee in the recent case in *Bharat Dharma Syndicate Ltd. v. Harish Chandra* MANU/PR/0049/1937 the great difficulty which is occasioned both to persons charged with fraud or other improper conduct, and to the tribunals which are called upon to decide such issues, if the litigant who prefers the charges is not compelled to place on record precise and specific details of those charges. In the present case the petitioner ought not to have been allowed to proceed with his petition and seek to prove fraud, unless and until he had, upon such terms as the Court thought fit to impose, amended his petition by including therein full particulars of the allegations which he intended to prove:

Their Lordships also observed that such cases as the present will be much simplified if this practice is strictly observed and insisted upon by the Court, even if, as in the present case, no objection is taken on behalf of the parties who are interested in disproving the accusations.

In the case before us the learned Subordinate Judge put the question to him at page 21 of the judgment in this form:

Now the question is whether in deciding not to work with gur the defendant acted bona fide under the impression of unfavourable market or whether as the plaintiffs' case is that they did not work because they did not want to invest a large amount of money in purchase of gur from January to April.

The learned Subordinate Judge framed this question in this form not on the pleadings but apparently upon the statement of witness No. 11 for the plaintiffs at page 11 where he stated:

The reason why the defendants did not want to work with gur at Bhatni was that it required a large outlay in the purchase of gur and they preferred to lay out that money on interest.

This statement receives corroboration from a letter Ex. 3a (8a) dated 29th April 1928 which was addressed by the plaintiffs to the defendants in which it was asserted that the defendants were intentionally refusing to work gur because in working with gur it is necessary to have full stock in which it is necessary to spend large amount of money and you do not want to lay out enough money (or in lump sum) in this business, so you adopt such procedure by which you may avoid working with gur...But in reality you did not want to stock gur, nor do you want to lay out proper amount of money in this business. These matters are wholly against the ekrarnama

dated 15th January 1925.

47. It may therefore be taken as established that the plaintiffs were under the impression that the defendants were not working the Bhatni Factory with gur because they found it more profitable to lay out their money on interest, but this assumes that the defendants were in full possession of funds and negatives the suggestion made by Sir Sultan Ahmad appearing on behalf of the plaintiffs, that the defendants were in difficulty in bringing forth such large sums as would be required to purchase the stock of gur. The evidence upon the record and the surrounding circumstances disclose the undoubted fact that the defendants are very big financiers who have a number of sugar mills and other business on large scales and that if they so chose they could easily invest the capital required for working the mill with gur in the season in question.

48. The question which falls then to be determined is whether the defendants in refusing to carry out the terms embodied in para. 3 of the partnership are liable to be mulcted in damages in favour of the plaintiffs. It will be convenient here to ascertain whether the plaintiffs can in law claim damages against a copartner who refuses to carry out the terms of the partnership. The obvious remedy of such a partner is to apply to the Court for dissolution as provided in Section 254, Contract Act (now Section 44, Partnership Act of 1932). But the question is whether in addition to this remedy a partner can also claim damages against his partner who wilfully breaks the terms of the partnership. I am aware of no case where damages have been allowed to a partner in an action for dissolution of the firm with reference to the very facts which constitute the cause of action for the dissolution of the partnership unless loss has actually been occasioned to the partnership for any fraudulent and dishonest conduct of the partner concerned.

49. In my opinion a claim for damages of the kind which is now under consideration does not lie against a partner at the instance of the partner who is asking for dissolution on the ground that the defendant-partners refused to carry out the terms of the partnership. The case in *Dean v. Macdowell* (1878) 8 Ch D 345 appears to suggest that "you cannot extend the cases with regard to a share in the profits to a case in which as between the parties there really was nothing but a breach of covenant" and that the question as to whether a breach of covenant has resulted in a loss to the partnership "would have been a matter for an action for damages if it could have been alleged or shown here." In my opinion where the defendant has committed a breach of the partnership articles after the institution of the suit for dissolution of the partnership based upon earlier breaches of the partnership Articles, the remedy of the plaintiff for being indemnified in resulting loss to the partnership lies if at all in bringing an action for damages. Upon this ground also I hold that the plaintiffs have no right to claim a relief so far as it concerns the damages or loss assuming it was sustained by him after the institution of the suit. In 53 IC 27 it is to be noticed that the Court expressly decided that where a partner is guilty of gross negligence, unskilfulness, fraud or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby.

50. In other words actual loss must be established by evidence and not a possible loss; the question which arose in that case was whether the defendant was liable to indemnify the plaintiffs for the loss which had actually accrued. There are some observations to be found in (1845) 63 ER 5566 which appear to support the contention that where the case of an act of fraud, or culpable negligence, or wilful

default, by a partner during the partnership, to the damage of its property or interests, in breach of his duty to the partnership, is established and where the partnership has been dissolved this matter must form the item in the accounts to be taken. To my mind this case again contemplates actual damage having been caused to the partnership. But, in the present case, no actual loss has been proved to have accrued. The claim is that if gur had been worked by the Bhatni Factory the working .would have resulted in profit and this is based upon a priori reasons on the ex post facto principles.

51. In the numerous cases which I have examined the question always arose whether a partner is liable for actual loss which has accrued and not for the share of the probable profits which may have been made for instance, the case in *Cragg v, Ford* (1942) 62 ER 889 where the claim was made that certain bales of cotton were deliberately and fraudulently not sold by the managing partner at a proper time and that when sold later resulted in actual loss which was measureable. The Court held that the partner in the exercise of his honest judgment did not think it prudent to make the sale at the time when it was suggested the bales should have been sold. It is to be noticed that in this case the claim was that the actual loss which had accrued should fall on the guilty partner. It was not a case of contemplated loss or a contemplated profit.

52. But it is argued that in the present case the learned Subordinate Judge who passed the preliminary decree dated 30th June 1930 has awarded damages to the plaintiffs for the non-working of gur in the Bhatni Factory for the period antecedent to the date of the suit or in other words in respect of facts which gave rise to the cause of action for the suit for dissolution and that no appeal having been preferred against this decree it is not open to the defendants to resist the claim of the plaintiffs which is now under consideration. In my opinion this argument is unsound. The learned Subordinate Judge did not make any declaration in the judgment dated 30th June 1930 making the defendants liable for the damages which are said to have accrued after the date of the suit.

53. When the trial opened before the learned Subordinate Judge the plaintiffs were aware that the mills had not worked pendent lite and it was open to them to have asked for an amendment of the plaint and if they had done so this matter could easily have been investigated and decided by the Court. The plaintiffs having failed to adopt the obvious course their claim for damages for the period subsequent to the date of the suit must be decided independently of any view expressed by the learned Subordinate Judge in his order dated 30th June 1930.

It was then suggested that the present case was much complicated in view of the fact that the defendants are not only partners but mortgagees in possession and, therefore, by the operation of Section 76, T.P. Act, they are liable for damages to the plaintiffs upon the footing of wilful default. In my opinion, the defendants are not mortgagees in possession.

54. As I have already pointed out the plaintiffs by their amendment petition of the plaint distinctly asserted that the defendants are simple mortgagees. In the mortgage bond dated 27th October 1925, para. 2 distinctly mentions that the mortgaged property is the interest of the mortgagors in the business of manufacturing sugar and molasses carried on by them under the deed of partnership dated 15th October 1925, along with the buildings machinery and appurtenances. In the deed of partnership it was distinctly mentioned that the milkiat right in the properties and the machinery of

the mills remained with the mortgagors and not with the partnership. Upon these facts it is clear that the position which the plaintiffs took in the amended plaint was a correct one, namely that the defendants are simple mortgagees. The learned Subordinate Judge in his judgment dated 30th June 1930 has also come to the same conclusion.

55. Who then was in possession of the mortgaged properties and the business of running the factories? The answer is obvious. It was the partnership who was in possession of the business which was to result in a profit in a sufficient quantity to discharge or reduce the burden of the mortgage executed by the plaintiffs. The manner of division of the profits of the concern or its destination is immaterial and irrelevant for the purpose of deciding as to who was in possession of the mortgaged premises. In my opinion, therefore, the question is not at all complicated by the assertion that the defendants are also mortgagees in possession. This assertion is not borne out by the evidence. But assuming that the defendants are mortgagees in possession they can only be in possession as such of the machinery and the buildings and not of the partnership business which ex hypothesi must be in possession of the partnership. Such being the case, if the mortgagors come to complain of mismanagement the first thing that requires consideration is what has the mortgagee of the machinery and the buildings done or what omission on his part can be called mismanagement. Is such a mortgagee expected to put the capital at a large scale and run the business? Can he be required to risk his own fortune in speculation and to incur hazard in an adventure that is ultimately to redound to the benefit of the mortgagor and even if such a mortgagee in possession of the buildings and machinery be required to risk his fortune in speculation on the chance of the adventure turning out profitable, would he be allowed to do so by the persons in possession who are the partners?

56. In my opinion such a claim by the plaintiffs must be ruled out as extravagant and unreasonable. The true view seems to be that if two persons are in partnership and one of them mortgages his share in the interest to the other, the dominant character will be that of the partnership and not of the mortgagee. As to whether the defendants can be made liable on the footing of wilful default in the circumstances of this case I may refer to the case in *Catherine Parkinson v. Robert Hanbury* (1867) 2 HLC 1 where it was pointed out that

a mortgagee who takes possession of the mortgaged estate is, on a bill for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default; but where persons, who though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subject to that special liability

and that

their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established.

57. Some argument was advanced before us as to the applicability of that elusive phrase "wilful default" to the case of the defendants in the present case. The cases which attempt to define "wilful neglect or default" have been summarized in *In re City Equitable Fire Insurance Co. Ltd.* (1925) Ch D 407. In my opinion the defendants are not liable even on the foot of wilful default assuming it to have been established

in the case, which I do not think has been established. It was contended by Mr. P.R. Das on behalf of the defendants that it was open to the defendants in the peculiar circumstances of the case (the peculiarity arising from the fact that the plaintiffs had instituted a suit for dissolution and were refusing to give the defendants the benefit of their advice when asked to do so) in the honest exercise of their discretion to refuse to work gur in the Bhatni Mill which would in these circumstances undoubtedly have been an undue hazard and risk by the defendants because (it was contended) in case the adventure resulted in a loss it might have been open to the plaintiffs to take up the position that they were not liable to share in the loss which was the result of an adventure taken by the defendants on their own risk, and if, so it is argued, the defendants in such a peculiar situation did not think it proper to; work gur, their refusal to work cannot be made the foundation of any claim for damages. It was also pointed out on behalf of the defendants that they had been working sugar cane to the fullest capacity in the period in question and this resulted in profits which have been shared by the plaintiffs (as had been found by the learned Subordinate Judge) and that it must consequently be assumed that if the adventure was profitable there was no reason why the defendants who were to have share in the profits half and half would not have begun and carried through the work of converting gur into sugar in the Bhatni Mill. Reliance is placed very strongly upon the finding of the learned Subordinate Judge at p. 21 that the plaintiffs' refusal to give an unequivocal reply to the defendants' query whether the mill should be worked with gur or not in" 1929 entitled the defendants to use their own discretion in the matter.

58. Mr. Das, relying upon this finding, adopts the view taken of the position of the defendants in similar cases reported in (1842) 62 ER 8899 that the defendants in the honest exercise of their judgment did not think it proper to work the Bhatni Mill with gur. The question then which I have to consider is whether there are any materials upon the record of reliable character which would coerce me to come to the conclusion that the exercise of judgment by the defendants was dishonest and unbusinesslike.

It is useful to recall here the surrounding circumstances which existed at the period in question when it is said that the defendants with a view to defraud the plaintiffs of their just profit decided not to work the Bhatni Mill with gur. The plaintiffs had instituted a suit for dissolution of partnership on 6th October 1928. It is common ground that the decision as to whether the gur should be worked in the Bhatni Factory must be made in the four months of December, January, February and March. The case of the defendants is that in January 1929, they sent their general manager, Gur Dayal Srivastava, D.W. 5 in the present proceedings, to the plaintiffs to inform them of the prevailing rate of Java sugar and molasses and to obtain consent of the plaintiffs for not working the Bhatni Mill with gur in that year. The manager embodied the result of his conversation with the plaintiffs in a report which was submitted to the defendants. A copy of this report is Ex. A at page 37 and refers to the interviews which the manager had with the plaintiffs on two occasions apparently both in January 1929. The plaintiffs are stated in that report to have taken up the natural attitude

that as a suit on behalf of Messrs. Nuri Mian and Co., against us (the defendants) was pending disposal in Court, it was not quite proper for him to give any opinion and that therefore he did not like to give any opinion verbally and added that if we wanted to make any enquiry about, we should make enquiry in writing from Messrs. Nuri Mian and Co., and then a suitable reply would be given in consultation with all the partners of Messrs. Nuri

Mian and Co., and the pleaders.

59. The report of the manager, adds that Messrs. Nuri Mian and Co., were of opinion that it was immaterial whether the work continued with gur or not because if all the staff of the mill had to be retained as before resulting in the same amount of expenditure of the partnership it was better that Messrs. Nuri Mian and Co., should further lose by continuing the work. It appears that in consequence of this report a letter was sent in writing to the plaintiffs on 27th January 1929 which is the date of dispatch of the letter No. 13/29 dated 26th January 1929. The receipt of this letter is evidenced by the entry in the peon book bearing the signature of Md. Habib, Ex. G(1) at page 36. The manager was again requested to obtain a proper reply by conversation with the plaintiffs upon this important question because no reply had been received till the middle of February 1929 and the defendants could not come to a final conclusion and the matter was urgent. The report Ex. A(1) states that on 16th February 1929 the manager went to the plaintiffs to obtain a reply to the letter of 26th January 1929 when he was informed by Wahid Mian, one of the partners, that no oral talk on this point was desirable and that a written reply would be sent to this letter in a few days.

60. Thereupon the manager went to Siwan on that very day and met other partners in order to make a pressing demand for a reply to the letter of 26th January 1929 and the reply which they gave, as stated in the report, is as follows:

We shall not give any reply to the said letter or any opinion privately in case of litigation. If Messrs. Kishori Lal Makundi Lal (the defendants) think it necessary they may get this matter adjudicated upon by Court. Otherwise they may do as they think fit. We have beforehand submitted a petition in Court making mention about gur, with a view to safeguard against loss to us. It would be better if the matter is decided there so that whatever decision may be arrived at will be clear. Otherwise as to the opinion given privately firstly law points as regards the accrual of cause of action are a hindrance to our giving a definite reply, Secondly in spite of the fact that in view of the present selling rate of gur there is no hope of profit from making sugar from gur, yet if the work be done very efficiently and economically, the expenditure on the staff may of course be met and if there be an occasion of a rise in the price there may be profit also; otherwise, in the present circumstances there is at present surely an apprehension of loss of interest on the capital invested. Still (?) in view of the consequences of verbal conversation for the most part during the period prior to making claim we know that nothing can be settled by oral and private conversation when we deny the present partnership of Messrs. Kishori Lal Makundi Lal on the basis of the claim. Such being the case we are not bound to give any opinion and we will not give any out of Court.

61. It is unnecessary to give any further quotation from this report. It is sufficient to say that I accept the finding of the learned Subordinate Judge on this matter when he holds (1) that

what this conversation really amounted to was that the plaintiffs declined to give any private reply in view of the suit pending between the parties, wanted the defendants to get the matter cleared up through the Court and finally expressed an opinion that even if the prospects were not very bright, the pay of the staff at least could be secured by a careful and economical

non-working while there was a chance of profit if the market improved; and (2) that the plaintiffs refused to give any unequivocal reply to the defendant's query whether the mill should be worked with gur or not in 1929. The defendants thereupon sent the letter, Ex. A(2), dated 17th February 1929, to the plaintiffs in which they made mention of the report which they had received from their manager and complained that no reply was received by them to their letter of 26th January 1929, mentioning that "still out of foresight we have purchased about 20,000 maunds of gar for making sugar at Bhatni Mill" and drawing attention to the fact that the time of purchasing gur was coming to an end. At line 25, page 41 in that letter, Ex. A(2), they stated:

If in view of the market rate of gur and the rates of sugar, present and future, up to March 1930 we make sugar from gur, there is an apprehension of loss in case the market tends to be against us, you will blame us on that occasion; and if for any earthly and heavenly causes there be rise in price, then you would blame us that in case sugar would have been prepared from goor, it would have brought profit,

and they pointed out that in the circumstances agreeing with the personal opinion of the manager they had decided that in view of the present circumstances we also think it proper to do work at one place only instead of preparing sugar from goor both at Siwan and Bhatni. As sugar is prepared from goor only at Siwan Factory, sugar should be prepared there only and after the sugarcane season is over, the mill at Bhatni should be closed.

62. In my opinion, the defendants were placed in a very serious predicament and if under the circumstances they did not think it proper to work the goor at Bhatni in view of the attitude taken by the plaintiffs it is impossible for any Court to say that they were not justified in so doing. If the plaintiffs were desirous that the mill should be worked it was open to them in view of the strained relations between the parties--the matter was actually pending in Court--to send a registered notice through their pleader to the defendants or to the defendants' pleader insisting that the defendants should work sugar in the composite factory; but instead of doing this they adopted an attitude that if there was a loss they would not be responsible and if there was a profit they would be entitled to share in it. This attitude of the plaintiffs is well put in "Lindley on Partnership" at page 560, 10th Edn. in these words:

The doctrine of laches is of great importance where the persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, come forward and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint adventure ended in loss instead of gain; and a Court will not aid those who could be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

63. I am therefore of opinion that it was not open to the learned Subordinate Judge to embark upon a speculation by working out the figures that if the defendants had worked sugar at Bhatni Mill in the season of 1929, the result would have been actual and not contemplated profit and having arrived at that conclusion to calculate the profits which would have accrued on a hypothetical working of 1,50,000 maunds of sugar and then to give the plaintiffs a decree for half of that amount. If the learned

Subordinate Judge had placed himself in the position of the defendants at the time in question, namely in the months of January and February 1929 and considered their situation that they were the defendants in a suit in which the plaintiffs had asserted that the partnership was at an end while the defendants were asserting that the partnership could not be dissolved at the mere sweet will of the plaintiffs, that the plaintiffs were giving no answers at all or only equivocal answers to the request of the defendants that the plaintiffs should agree that there should be no working of the goor in view of the prevailing market rate and that the defendants were on the horns of a dilemma that if there was a loss the plaintiffs would undoubtedly repudiate the working if started by the defendants and this matter would be subject-matter of a lengthy proceeding in Court (10 years have gone by since this partnership action was instituted and still the final decree is under discussion before us) and if there was a profit the plaintiffs would undoubtedly have come forward to have their share, I think he would have arrived at the conclusion that the defendants were justified in taking the steps they did, namely that they chose not to work this factory.

64. I do not find that the learned Subordinate Judge has taken the slightest notice of the peculiar situation in which these defendants were placed. Sir Sultan Ahmed contended that all these discussions were irrelevant because in his submission para. 3 of the deed of partnership makes it incumbent upon the defendants to work in all cases except those which are specifically provided therein. His argument is that even if the market rate of molasses was unfavourable and no profit was capable of being yielded, still the work of manufacturing sugar from molasses must be carried on unless the plaintiff agreed to its stoppage and he argued that the other contingencies, namely celestial and terrestrial calamities, etc. had not arisen. In my opinion, this argument is wholly fallacious. Para. 3 of the deed of partnership contemplates cases of a normal state of affairs where the partnership is going on smoothly and the parties are on terms of businesslike amity.

65. It has no application where an abnormal situation has arisen, for instance where the partners are not even on speaking terms and are bitterly opposed to each other, and where one partner has actually filed a suit in a Court alleging that the partnership has been dissolved. In such a state of affairs it is impossible to have any consultation with the parties. The plaintiffs refused to be consulted. They declined to give any advice or opinion and therefore there cannot be a mutual consultation or "Mashwara Farikain." In such circumstances the situation which arose is covered even by the express words of para. 3 because it is impossible to have "any consultation with the parties" and even if it does not fall strictly within the express words thereof a Court of justice will be slow to fasten an inequitable and impossible position and liability on the parties in the peculiar circumstances that prevailed at that time,. The defendants therefore were in the situation that they could work if they liked at their own risk and peril and they, after attempting to consult the plaintiffs seriously, decided not to run any risk in this highly risky working of the composite factory, but they took a lesser risk in working the sugar in the other factory and in other seasons which did not involve so much risk and the working whereof resulted in actual profit which has been shared by the plaintiffs.

66. I do not wish to devote any time in examining the figures which have been worked out by the learned Subordinate Judge as to the contemplated expenditure and receipts for 100 maunds of goor in these months. His calculation is at p. 26 of the judgment and although he may have over-estimated the value of the receipts or underestimated the expenditure to a small extent here and there, upon the whole I agree with the conclusion of the learned Subordinate Judge that if 100 maunds of

goor had been worked there would have been a contemplated prospect of profit of about Rs. 21 per 100 maunds. As indicated above, in my opinion, even if this is so, this cannot be made the foundation of giving the plaintiffs any decree for half the profits in what has not actually accrued but would have accrued if the calculation made by the learned Subordinate Judge in the four months of December, January, February and March had actually stood the test of time.

67. The question whether these figures would work out to be exactly the same figures after the lapse of time is immaterial because we cannot allow ourselves to be guided *ex post facto*; but we can only decide upon the principle as to whether a prudent businessman ought to have embarked upon the speculation and risk in January and February keeping in view the attendant circumstances which actually existed between the parties at that time. In my view, the answer is emphatically in the negative and I would exonerate the defendants completely.

I agree with my learned brother that the defendant-appellants are not entitled to challenge the decree so far as the sum of Rs. 31,744-0-10 was awarded by the preliminary decree of 18th August 1930 by reason of their failure to prefer an appeal against that judgment and decree. The result is that in my opinion the appeal must be allowed in part and the liability of the defendants reduced by Rs. 42,483-6-6.

68. In the circumstances I would order the parties to bear their own costs of this appeal.

[On difference of opinion between Mohamad Noor and Manohar Lall JJ., the case was referred to Dhavle J. who delivered the following judgment.]

Sankara Balaji Dhavle, J.

69. This matter arises out of a partnership action and has been referred to me under 01. 28 of our Letters Patent on a difference of opinion between Mohamad Noor J. and Manohar Lall J. The plaintiffs and defendant 6 were carrying on a business of manufacturing sugar under the style of Messrs. Noori Mian & Co. They owned the Desi Sugar Factory at Siwan, a refinery where sugar was manufactured from gur (molasses), and the Noori Sugar Works at Bhatni, a composite factory where sugar was manufactured as well from cane as from gur, the cane season being about November to May when sugarcane is available as raw material while gur had to be purchased and stored from the middle of December to the middle of April for being refined into sugar from June to October. On account of financial embarrassments the owners entered into a partnership with defendants 1 to 3 under a deed of 15th October 1925 (Ex. 1). This partnership was confined to the business carried on at the factories (referred to as 'mills' in the deed). The entire management was to be in the hands of the new partners who were to provide all the working capital without any interest, the owners on their part being entitled to nothing on account of the depreciation of the machinery. The partnership was for an expressed term of five years. Reference was made in the deed of partnership to a mortgage deed to be executed by the owners in favour of the new partners mortgaging the factories as security for Rs. 5,75,000 the amount of debts owing from the owners and to be paid off by the new partners. On this amount the owners were to be charged interest at the rate of 9 percent, per annum. The profits of the sugar business were to be divided equally between the parties, but out of the owners' moiety three-quarters was to be paid to the new partners on account of the mortgage and one quarter only was to be actually paid to the owners. Under Clause 3 of the partnership deed (which will have

to be dealt with in detail later on) the new partners bound themselves to run both the mills throughout the season every year with sugarcane and gur, and apart from circumstances beyond their control, such as celestial and terrestrial calamities and strikes, they were entitled to stop the manufacture of sugar on consultation (if not by agreement) between the parties

if at any time, on account of dullness of the market the rate of gur be such that there be no hope of profit in manufacturing sugar from gur.

70. Exhibit 2, the mortgage bond, followed on 27th October 1925. This included among the mortgagees not the managing partners (defendants 1 to 3) only, but also their uncle Babu Kanhaiya Lal, the since deceased father of defendants 4 and 5. It was executed in pursuance of the said deed of partnership and in consideration of the advance of Rs. 9,75,000, carrying interest at 9 per cent, per annum for a term of five years, and in case of default the mortgagees shall be entitled to enforce their right for sale of the mortgaged property.

Under Clause 5 of this bond it was agreed that notwithstanding the term of five years fixed in the partnership deed, the mortgagees were, until the full discharge of the money due to them, entitled to retain under the terms of the aforesaid deed of partnership the enjoyment and possession of the properties (mortgaged)...to use and dispose of it in and for the purpose of the said business....

71. Not long afterwards disputes broke out between the owners and the managing partners about making sugar from gur; the profits from this particular branch of the business were comparatively small, but the plaintiffs asked "when there is profit, why do you want to evade working with gur?" There were other disputes also; and on 27th August 1928, the plaintiffs gave a notice to defendants 1 to 5 through a pleader, charging them with breach of "practically each and every term and condition of the partnership" and saying that from that day the partnership stood dissolved, adding that it had stood "legally dissolved" on the death of Babu Kanhaiya Lal, an event of 14th January 1928. On 11th September 1928 the managing partners sent a reply denying that Babu Kanhaiya Lal was a partner, and asserting that even if he were to be considered to have been a partner, the partnership was continued by the parties with full knowledge of the death of Babu Kanhaiya Lal. They further denied the breaches alleged by the plaintiffs and claimed in the event of dissolution of the partnership to remain in possession as usufructuary mortgagees.

72. On 6th October 1928, plaintiffs brought their suit for a declaration that the partnership "has been dissolved on the grounds mentioned in the plaint" (the notice of August besides the death of Babu Kanhaiya Lal) or for a decree for dissolution. The plaint also asked for accounts, besides recovery of possession or management of the two factories and further, for a decree for Rs. 6,00,000 as profits (said in para. 7 of the plaint to be)

calculated according to the true terms of the partnership deed including the damages which the plaintiffs have suffered owing to the gross misconduct and negligence of the defendants.

73. The gross misconduct charged included, without being mainly constituted by, the failure of the defendants in breach of the term in the partnership deed to work the factories with gur for the full season. One of the prayers made in the plaint as it stood originally was for

removal of the defendants from the management and possession of the factories as partners or mortgagees on such terms as the Court considers proper.

By their written statement defendants denied that the partnership stood dissolved and also denied any breaches of the terms of the partnership deed. They further claimed to be in occupation of the two factories under what they called the usu. fructuary mortgage deed as well as the deed of partnership, and urged that the plaintiffs' prayer for the defendants' removal "as partners or mortgagees" was not maintainable unless plaintiffs sought redemption of the usufructuary mortgage on payment of further court-fees. Upon this the plaintiffs had their plaint amended by the omission of the words "or mortgagees" from the prayer in question, stating that the words were redundant since it was only as partners that possession had been delivered to them and the mortgage was only a simple mortgage and had been discharged. This was done long after the issues had been framed and while the plaintiffs' case was being opened and the question of court-fees discussed.

74. On 30th June 1930, the Subordinate Judge delivered an elaborate judgment in the case, ordering that a preliminary decree be passed for dissolution of the partnership as from that date with accounts as from 1st December 1926, including Rs. 31,744 awarded to the plaintiffs as compensation for their half share of the profits that would have accrued to the partnership if the managing partners had properly worked gur at Bhatni in 1925-26 and 1927-28. Babu Gurdayal Srivastava, the General Manager of the business, was appointed Receiver and directed to wind up the business and prepare the accounts. While the Receiver was doing this work, the plaintiffs filed an application on 27th April 1931, before the successor of the Subordinate Judge who had passed the preliminary decree. In this application compensation was claimed for the failure of the defendants to work the Bhatni factory with gur in (May to October) 1929. Plaintiffs said that this failure of the defendants

was deliberately and illegally done by them in contravention of the express terms of the deed of partnership and without the consent or approval of the members of Noori Mian & Co. as laid down in the partnership deed.

This failure was subsequent to the filing of the suit,

and as the trial had begun before the end of this period, so the only remedy of the plaintiffs is to ask for the assessment and getting of the compensation at this stage and before the preparation of the final decree.

75. It was further pointed out in the application that the judgment of 30th June 1930, had ordered "that accounts are to be taken up to dissolution." The plaintiffs claimed Rs. 42,483-6-6 on this account as their moiety of the estimated profits. In reply the contesting defendants said that the application was not legally maintainable during the course of the winding up proceedings, that the application did not disclose any cause of action for the damages claimed, that the defendants as managing partners had acted bona fide in view of the prevailing market rates of gur, that the plaintiffs had been informed of the position and were themselves of opinion that working with gur was not profitable, and that if the Bhatni factory had been worked with gur, heavy losses would have resulted as in 1927-28. Plaintiffs put in a rejoinder, and after a regular trial the Subordinate Judge allowed the application of the plaintiffs on 1st October 1931, and directed that the amount claimed by them together with Rs. 2000 as the costs of this proceeding be shown "on their credit side

in the final accounts as on 1st November 1929."

76. In November 1931, the defendants applied for a transfer of the proceedings to this Court in the exercise of its extraordinary original jurisdiction, and the case was transferred by consent accordingly and placed before Wort J. On 18th January 1932, the defendants moved this Court in revision (Civil Revision No. 33 of 1932) against the order passed by the Subordinate Judge on 1st October 1931. This application was dis. posed of by Wort J. in the revisional jurisdiction of this Court on 13th February 1932. The learned Judge declined to interfere in revision on the ground that the defendants had a right of appeal. He also made certain observations on this occasion as regards the jurisdiction of the Subordinate Judge, and I shall have to refer later on to some of them so far as the appellants have relied on them.

77. Sitting on the extraordinary original side Wort J. was later on moved by the defendants under Section 151, Civil P.C., to vacate the judgment of the Subordinate Judge regarding the Rs. 42,483. The learned Judge held that, sitting as he was, his powers were no greater than those of the Subordinate Judge and that Section 151 was inapplicable. An appeal was filed under the Letters Patent against this refusal and was held to be inadmissible. By an order of 10th February 1933, the learned Judge gave effect to the order of the Subordinate Judge in the final accounts. On 21st March 1933, the learned Judge passed his last order in the account matter; and against the judgment constituted by this order the defendants appealed under Clause 10 of our Letters Patent. This appeal was confined to the two sums of Rs. 31,744-0-10 and Rs. 44,483-6-6 awarded by the Subordinate Judges to the plaintiffs by way of compensation or damages. It was heard by Khaja Mohamad Noor J. and Manohar Lall J. who were agreed that in respect of the sum of Rupees 31,744-0-10 the appeal was barred by Section 97, Civil P.C., this part of the appeal being in fact not pressed. As regards the other item of "damages" the learned Judges were agreed that the amount was correct, but they differed as regards the liability of the appellants to pay anything in the nature of damages for omitting to work the Bhatni Factory with gur in 1929; and this is the point which has been referred to me under Clause 28 of the Letters Patent. Khaja Mohamad Noor and Manohar Lall JJ. overruled the contention of the plaintiffs-respondents that no appeal lay against the order awarding them this sum of Rs. 44,483-6-6.

78. These respondents have not repeated their contention before me but have accepted the position that an appeal does lie.

Mr. P.R. Das for the appellants has urged in limine that the preliminary decree was a decree for accounts in common form only, and that therefore the lower Court had no jurisdiction, for the purpose of those accounts, to award damages for a breach which was not covered by the suit and decree.

79. It is said that assuming that the breach, which is dated 1929, will support a decree for damages, it was an independent cause of action which had nothing to do with the suit as brought and the account as decreed, and that no notice should have been taken of it in working out the final decree--indeed no notice could have been taken even before the preliminary decree: *Ruys v. Royal Exchange Assurance Corporation* (1897) 2 QB 135. Learned Counsel adopted as his argument the observations of Wort J. in Civil Revn. No. 33 of 1932 that assuming that one partner can claim damages against another for such breach of duty as would entitle the objecting party to a dissolution, such a right has nothing to do with an account and that the Subordinate Judge had no jurisdiction to pass "a sort of supplementary

preliminary decree" "on a cause of action which did not arise in the pleadings and on which no evidence was given and consequently he was functus officio."

80. The relation of a preliminary to final decree was considered by Rankin C.J. in the Full Bench case in *Taleb Ali v. Abdul Aziz* MANU/WB/0340/1929 : AIR1929Cal689 , and it may be taken that the function of the latter is merely to re-state and apply with precision what the preliminary decree has ordained, and that the final decree is not only based on but is also controlled by the preliminary decree and cannot travel beyond it. In order to determine how this principle is to be applied to the present case, it is necessary to look somewhat closely into the nature of the suit and of the decree. Manohar Lall, J. has remarked that

the suit stood, when the trial began, as a mere suit for dissolution of partnership and rendition of accounts

81. In which the decree also awarded to the plaintiffs "certain sums in the nature of damages for nonworking or short working of gur in the factories." This makes it all the more necessary to look closely into the nature of the partnership and of the suit and preliminary decree. The partnership was complicated by a mortgage in favour of the managing partners and Kanhaiya Lal, and by the managing partners being required to apply three-quarters of the owners' moiety of the profits in discharge of the mortgage dues and to work the factories with gur to their full capacity. The preamble of the mortgage deed spoke of the mortgagees, undertaking to carry on as partners of the mortgagors the business of the two mills or factories, and Clause (5) of the mortgage bond, which I have already quoted, in effect provided for an extension, if necessary, of the term of five years fixed, in the partnership deed until the mortgagees were paid off either from the fixed proportion of the owners' share of the profits or otherwise. The mortgage was thus so linked up with the partnership arrangements that Wort J. even spoke of the defendants being mortgagees in possession.

82. The defendants also claimed throughout the suit to be usufructuary mortgagees or mortgagees entitled to retain possession even after the dissolution of the partnership until the redemption of the mortgage. The plaint as it originally stood sought the removal, of the defendants from the management and possession of the factories as "partners or mortgagees." As I have already stated, the words 'or mortgagees' were afterwards omitted when the defendants raised the question of court-fees. But in spite of the omission of those words defendants 4 and 5, the heirs of Babu Kanhaiya Lal, remained on the record, though they were not partners; and this actually enabled the parties--after the restoration of the factories to the plaintiff--in substance to settle the mortgage claim by a personal decree against the mortgagors, as will be seen from Wort J.'s final order of 21st March 1933. It is obvious that the learned Judge would never have allowed this if the suit had been no more than a mere partnership action plus a claim for damages for two specific breaches of the covenant to work with gur.

83. The plaintiffs had claimed immediate possession of the factories besides a sum of six lakhs of rupees on the ground that their share of the profits of the partnership business "including the damages which they have suffered owing to the gross misconduct and negligence of the defendants" was "sufficient to wipe out the advance on the security of the mortgage" and leave them with the credit stated. though the plaint uses the word 'damages' in more than one place, the accounts annexed to the plaint to show how the sum of six lakhs was arrived at make no mention of damages

but proceed on the profit that would have been earned if the factories had been worked as the plaintiffs claimed they ought to have been worked. There was an issue framed in the suit (issue 2) about

whether the defendants worked the factories for the full season and to their full capacity and are guilty of various other acts of commission and omission complained of in the plaint.

84. But, as Mr. P.R. Das himself points out, there was no issue framed about whether the plaintiffs were entitled to damages for any of the large number of acts of commission or omission referred to in issue 2. The suit was brought on the footing that the partnership had already been dissolved by the death of Kanhaiya Lal, and, again by the notice of dissolution given by the plaintiffs in August 1928. Alternatively, the plaintiffs claimed to be entitled to get the partnership dissolved on account of the gross misconduct of the financiers, the breaches committed by them in the observance of the terms of the agreement, etc. The Court held that Babu Kanhaiya Lal had never been a member of the partnership, but that the plaintiffs were entitled to dissolution and accounts. No less than thirty acts of commission or omission were established against the defendants, and the learned Subordinate Judge found more than one broad ground for decreeing dissolution besides "breach of terms of partnership deed which are not trivial and persistently made": see pp. 499-502 of Parts I and II of the paper-book of Letters Patent Appeal No. 60 of 1933. Accounts were ordered from 1st December 1926 to 30th June 1930.

85. The latter was the date of the judgment and was fixed as the date of the dissolution, the former was the date of an adjustment of accounts which, as far as it went, was held by the Court to be binding on the parties. This adjustment was however found to have left out compensation to the plaintiffs for the managing partners' failure to work with gur at Bhatni in 1926 (1925-26) and compensation on this account and compensation also for the failure of the managing partners to work the Bhatni Factory with gur to its full capacity in the season of 1927-28, calculated on the basis of (the plaintiffs' share of) the profits that would have been earned, was also awarded to the plaintiffs to be "set off against the mortgage dues": see p. 505 *ibid*. It was also remarked under the issue relating to court-fees and relief that "there is no separate claim for damages which is not really covered by normal profits" (p. 508 *ibid*); and the question of compensation was merely dealt with as part of "the question of taking accounts and on what terms they are to be taken and for what period" (p. 502 *ibid*).

86. The accounts decreed were thus not the ordinary accounts in an ordinary partnership action. They were not confined to the assets and liabilities of the partnership, but were to include "compensation" for the two branches prior to the suit "to be set off against the mortgage dues." It is even more significant that the compensation was awarded not because the plaintiff was taken to have claimed any damages separately from the claim for accounts but because the compensation represented the plaintiffs' share of "normal profits" as part of the proper accounting in the case. It seems clear that the learned Subordinate Judge proceeded to his preliminary decree not on the footing of an ordinary partnership action (with accounts in common form) plus damages for two specific breaches of covenant, but as if he had to settle all claims between the parties (including defendants 4 and 5 who were no partners), and that he held the managing partners liable not merely for profits actually made but also for profits that would have been made if they had observed their covenant as regards the full working of the Bhatni mill down to the

institution of the suit. And according to the decree the receiver was not to be discharged "unless full accounts are taken of the dues and liabilities of the firm and the share of profits or losses of the parties."

87. Such was the preliminary decree which had to be worked out in the case. It was of course based on causes of action prior to the institution of the suit, and it ordered accounts up to 30th June 1930, the date of dissolution (a little under two years after the institution of the suit). The partner defendants had meanwhile continued to carry on the partnership business in assertion of their right to do so. The accounts ordered were to include "the share of profits or losses of the parties," and what the Court meant by "profits" was indicated clearly enough by its treatment of the breaches: by the managing partners of the covenant to work with gur in two years prior to the institution of the suit. The profits or compensation on account of these breaches had been worked out on the basis of "normal profits," and plaintiffs' share was to be set off against the mortgage dues. I am only repeating this in order to emphasize the peculiar character of the preliminary decree. No breach subsequent to the institution of the suit was before the Court which passed the preliminary decree, but (as already observed) the account ordered to be taken was, it would seem, intended to settle all claims between the parties including defendants 4 and 5 though it was declared that they were not partners. These defendants are among our appellants.

88. Plaintiffs' petition of 27th April 1931, which I have already set out and which in substance asked for compensation for 1929 on the same lines as for 1926 and 1928, was obviously meant as part of the proceedings in the suit consequent on the preliminary decree with its date of dissolution and its compensation for breaches prior to the suit: see paras. 4, 5 and 7 to 9 of the petition. It was also regarded in this light by the Subordinate Judge who negatived the defendants' contentions: (1) that the plaintiffs' had treated the question of damages "as a separate claim from the claim of dissolution," and (2) that the trial Court had "kept the claim of dissolution based on misconduct apart from the claim for damages arising from that misconduct." It was for these reasons that by an order of 16th May 1931, (see pp. 276-9 of the paper-book already referred to) he held that the plaintiffs' application of April 1931 must be enquired into as a part of the proceedings consequent on the preliminary decree. Defendants applied to this Court in revision against this order, but the application, Civil Revision No. 332 of 1931, was rejected by Wort and Khaja Mohamad Noor JJ. on 18th June 1931: the learned Judges were apparently not satisfied that any question of jurisdiction was involved--an important circumstance which ought to be borne in mind before allowing this appeal on the ground that the application of April 1931 was incompetent and that the plaintiffs' remedy, if any, was by suit.

89. The Subordinate Judge then investigated the matter and passed his final order on the 1st of October 1931 and when defendants again came up in revision before Wort J. in Civil Revision No. 33 of 1932, the application was dismissed on the ground that they had a right of appeal, the learned Judge adding that he could not in his discretion exercise his revisional jurisdiction because

the High Court should not interfere in interlocutory-matters byway of revision when the same relief can be obtained in another way.

90. The order fixing the compensation for 1929 thus seems to have been regarded by Wort J. in this context as an interlocutory matter, though he had also observed that the Subordinate Judge was *functus officio* and had no jurisdiction to pass a

supplementary preliminary judgment or decree. The defendants, who were aggrieved by the order of the 1st October 1931, did not apparently consider that they were entitled to appeal against it before the final decree. They would have been entitled indeed if they wished to appeal at all, bound to do so without waiting for the final decree, if the order of the Subordinate Judge had really been a supplementary preliminary decree. But, as I have already said, the plaintiffs respondents do not now dispute the right of the defendants to maintain an appeal at the present stage against the sum awarded by that order of the Subordinate Judge, though they did dispute it before Mohamad Noor and Manohar Lall JJ.

91. It cannot therefore be said to be absolutely necessary now to determine whether the order was merely an interlocutory order or whether it really amounted to a supplementary preliminary decree.

What I have said about the peculiar character of the preliminary decree is sufficient to dispose of the appellants' contention that it was a decree for accounts in common form. The alleged breach of 1929 was not, in fact, brought forward as "a cause of action" for another preliminary decree, and I have already said enough to show why it cannot be held to have nothing to do with the suit as brought and the account as decreed. This alleged breach did mean a fresh investigation, only because it arose long after the institution of the suit; if the claim succeeded, however, its disposal was, in my opinion, determined by the preliminary decree for accounts of "the share of profits" and would have followed exactly the same lines as for 1926 and 1928.

92. When the defendants' objected that the application of the 27th April 1931, did not disclose a cause of action, the plaintiffs' rejoinder was that the "cause of action" accrued on the 30th November 1929 and the final order of the Subordinate Judge directed that the amount claimed by the plaintiffs be shown "on their credit side in the final accounts as on 1st November 1929." These dates rather militate against the contention (accepted by Wort J. and Manohar Lall J.) that the plaintiffs could have amended their plaint so as to include this breach of 1929; for the trial of the suit had already begun (on the 18th September 1929.) So far, moreover, as dissolution of the partnership (with an order for accounts as a matter of course) was concerned, the plaintiffs had a complete cause of action in 1928 independently of any breaches of the covenant to work with gur. The principle that the rights of the parties must be ascertained as at the date of the action brought, in support of which Mr. Das cited (1897) 2 QB 135,15 does not seem to have any application to a case like the present; if it did, the contention that the plaintiffs ought to have amended the plaint so as to include the breach of 1929 would itself be wholly untenable.

93. The breach of 1929 did not affect the plaintiffs' right to a dissolution of partnership, nor their right to an account as already decreed. What it did do was to add precision to the account of the "profits" of 1929 and possibly lend to a determination of the "mode" in which the account of that year (within the meaning of our Order 20, Rule 17) was to be taken on grounds which were not and could not be before the learned Subordinate Judge when he passed his preliminary decree. The position seems to be somewhat similar to the "just allowances" that are allowed in England, a point with which I propose to deal later on. If the suit had been an ordinary suit for dissolution and accounts, the breach of 1929 might perhaps have been an independent cause of action if advanced as a ground for damages; but as it was, a careful reading of the plaint, judgment and decree, as shown above, leads to the conclusion, reached by Khaja Mohamad Noor J. that "the investigation of the claim for the loss (of 1929) was covered by the suit and the preliminary decree for

accounts." For, as the Subordinate Judge has shown, the failure of the managing partners properly to work with gur recurred year after year, though a loss was incurred in 1926-27 and no compensation was claimed for that year.

94. I take it that the contention that the plaintiffs should have amended their plaint so as to include the breach of 1929 is not intended to convey that the failure was absolutely fatal and left them without any remedy at all. There could be no *res judicata* regarding "a cause of action" that arose subsequently to the suit. It would, therefore follow that if the breach of 1929 were, as the appellants say, an independent cause of action, the plaintiffs should have proceeded not by an application in the proceedings after the preliminary decree but by suit. But supposing that it was open to the plaintiffs during the account proceedings to bring such a suit (a point by no means free from doubt) and that they had done so, the suit would, on account of its connexion with the partnership, have presumably been tried by the same Subordinate Judge (and the proceedings relating to the accounts stayed meanwhile).

95. When asked to point out in what material respect the appellants would have been better off if the plaintiffs had filed such a suit instead of the application of April 1931. Mr. Das frankly admitted his inability to do so. The application was dealt with in all material respects exactly like a suit. It is true that it was not stamped as a plaint, but this is explained by the treatment of the question of court-fees on the plaint of October 1928. (see Issue No. 6 at pp. 507 to 510 of Parts I and II of the Paper Book in Letters Patent Appeal No. 60 of 1933); and the absence of court fees can furnish no real grievance to the appellants as in the result they would have had to bear the cost, and they have had their mortgage claims settled in this suit without the payment of court-fees by either side.

96. And the rule laid down in *Rai Charan Mandal v. Biswa Nath Mandal* AIR (1915) Cal 103 has been repeatedly followed in this Court, that though a suit is to be tried in all its stages on the cause of action as it existed at the date of its commencement, notice may be taken of events which have happened since the institution of the suit and relief afforded to the parties on the basis of the altered conditions, where it is necessary to do so "in order to shorten litigation or to do complete justice between the parties." See for example *Kuldip Mahto v. Muhammad Hashim* MANU/BH/0150/1928

The facts that I have stated in some detail show how the proceedings were at point after point unlike the proceedings in an ordinary partnership action with accounts in common form.

97. It is no doubt possible to take a stricter view of the pleadings and orders, but if that is so, will it be right now to hold that because the plaintiffs did not amend their plaint in respect of the breach of 1929 and were therefore left without any express direction in respect of it in the preliminary decree, therefore they could only obtain "compensation" for this breach by bringing a separate suit? To do so would be to defeat a just claim (an assumption which must be made in the present context) for purely technical reasons, since a suit would now be time-barred. This result must, in my opinion, be avoided if possible within the limits of the law. In *Peary Mohan Mookerjee v. Manohar Mookerjee* MANU/WB/0055/1923 : AIR1924Cal160 their Lordships of the Judicial Committee had affirmed a decision of the Calcutta High Court and added that "an account should be directed showing what, if anything, is due from the first appellant (the shebait) to the estate;" and upon the basis of this

order the Subordinate Judge made an order defining the extent and character of the liability of the shebait to render an account and specifying the mode, the period and the properties. Mookerji and Rankin JJ., held that the Subordinate Judge had jurisdiction to pass the order. Mr. Das has endeavoured to distinguish the case in question as a case against a trustee, while a partner is not a trustee.

98. The point of such a distinction if any, would be that a trustee cannot avail himself of a plea of limitation against the cestuique trust and may further be liable to account on a footing of wilful default. But no question of limitation arises in the present case, nor am I at present concerned with whether the managing partners were liable to be held responsible for profits that were not but would have been earned; it will presently appear that they were. The fact remains that in the case cited jurisdiction was found for the Subordinate Judge to define something which was left undefined in the order for an account. The learned Judges actually held that the Subordinate Judge's order was a supplementary preliminary decree but as I have already shown, it is immaterial in the present case whether the Subordinate Judge's order was of that character or was merely an interlocutory order, though I am inclined to agree with Mohamad Noor J., that it was an interlocutory order.

99. A still more illuminating illustration of what a Court may do is furnished by Raghubans Narain Singh v. Khub Lal Singh MANU/PR/0048/1931 a case of a suit for recovery of the plaintiffs' milkiat share, for joint possession over the khudkasht lands to the extent of their share therein and for mesne profits. This was decreed, but on appeal there was a remand. A fresh trial followed, and then another appeal, which ended in a compromise decree entitling the plaintiffs not to joint possession over the khudkasht lands and mesne profits, but to compensation. The question thus arose whether the plaintiffs were entitled to compensation for the period (of about 15 years) subsequent to the institution of the suit the defendants still being in possession. Had the decree that was ultimately passed awarded mesne profits, the plaintiffs would have been entitled to a decision in their favour under Order 20, Rule 12. But the decree was for compensation, and this Court held that the matter was governed, not by the rule in Robert Watson v. Ramchand Dutt (1891) 18 Cal 10, but by the general rule that the Court has no jurisdiction to give plaintiffs a decree in respect of a cause of action that had not accrued to them at the date of the institution of their suit. On appeal to the Privy Council, Lord Blanes-burg observed:

Their Lordships do not question the correctness of the general proposition with which the learned Judges commence, and its cogency was enforced by Mr. Pringle's able argument before the Board. But the learned Judges have failed to appreciate the importance and breadth of the decision of the Board in Robert Watson v. Ramchand Dutt (1891) 18 Cal 10. Their Lordships can see no indication in the report of that case that the period for payment there fixed was so fixed by consent, or by any other considerations than those of justice, equity and good conscience, which instructed the decision regardless of considerations purely technical in character. It is a precedent which completely justifies, in point even of principle, the view of the order of 4th February 1919, taken by the learned Subordinate Judge.

100. Thus it was held, in substance that notwithstanding the general rule that a claim cannot be decreed that had not accrued at the date of institution of a suit, the Court had power in the circumstances of the case to decree compensation for a period subsequent to such date. In the present case the plaintiffs apparently did not anticipate dissolution from the date of judgment only, and their failure to amend the

plaint before the preliminary decree so as to include the breach of 1929 cannot from any point of view be taken to bar that claim altogether. They were entitled to, and had obtained, an order for dissolution and accounts irrespective of this breach. A suit by one partner against another for damages for breach of a covenant of the partnership deed, brought before dissolution, is liable to be defeated on the ground that a suit between partners should be a suit for general accounts in which the defaulting partner could be debited with any loss that might have been caused by his action: *Santhanakrishna Naidu v. Chellappa Aiyar* MANU/TN/0420/1926. But here there was at the time of the plaintiffs' application of 1931 already a decree for dissolution and general accounts. If instead of making that application plaintiffs had proceeded by suit, I take it (as I have already said) that the accounts that were proceeding under the preliminary decree would have been held up, for, it is not to be supposed that the defendants who maintained that much money was due to them from the partnership would have agreed to accept a liability to the plaintiffs irrespective of the general accounts in progress.

101. I have also already shown that such a suit, if one lay at all during the pendency of the accounts, would have been triable by the same Subordinate Judge (no less than an amendment of the plaint before the preliminary decree, suggested by Wort J. and also by Manohar Lall J.). Further, while "compensation" for breaches was in fact not dissociated from the general accounts of the partnership business, the claim for 1929 was not *res judicata*. If a fresh suit had to be brought, the plaint would have contained nothing that is not to be found in the petition of April 1931, read with the plaint of 1928, and the actual proceeding before the Subordinate Judge in substance went on like a suit, the right of appeal being now conceded to the appellants by the other side. It seems to me, that in these circumstances the question raised by the appellants refers less to jurisdiction properly so called--the authority of the Court to deal with the subject-matter--than to technicalities of procedure.

102. In my opinion, the order awarding the sum in question to the respondents, even if it might appear irregular from some points of view, cannot now be properly interfered with on the ground that the Subordinate Judge had no jurisdiction" to make it; to do so would be to sacrifice considerations of justice, equity and good conscience to considerations which in 11 Pat 2219 their Lordships of the Judicial Committee overruled as purely technical in character. Order 33. Rule 8, of the Rules of the Supreme Court in England provides that in taking any account directed by any judgment or order, all just allowances shall be made without any direction for that purpose; and when a partnership account is ordered it is not usual for the Court to determine beforehand what are, and what are not, just allowances. Wilful inattention to business, which is discussed at page 469 of *Lindley on Partnership* (10th Edn.) in the Section relating to "Compensation for Trouble" is thus apparently dealt with by the Master in the first instance, proceeding on the articles of partnership and the settled rules and principles.

103. We have no specific provision in India corresponding to this Order 33, Rule 8 though under Order 20, Rule 15 of our Code the Court is, by its preliminary decree, to direct such accounts to be taken as it thinks fit, while Rule 17 of the same Order, which Mohamad Noor J. apparently had in mind, enables the Court by any subsequent order to give any special directions with regard to the mode in which the account is to be taken. The model form of decree, Form No. 21, given in Schedule 1, App. D, to our Code of Civil Procedure does not speak of "the share of profits or losses of the parties" (the expression found in our preliminary decree); and conceding that the receiver appointed to take ordinary accounts in an ordinary partnership action could

not have gone into the question of "profits" in the sense intended by the learned Subordinate Judge, that does not seem to me sufficient to negative the power of the Subordinate Judge himself to look into the question on an application by the plaintiffs in the proceedings that followed upon his preliminary decree. The appellants' objection on the score of want of jurisdiction must therefore be overruled.

104. I now turn to the question whether in law a claim for compensation in the sense used by the Subordinate Judge, i.e., a claim for the plaintiffs' share of the profits that would have been earned for the partnership if the managing partners had observed their covenant to work with gur--lies against partner. In his observations in Civil Revision No. 33 of 1932, Wort J. called it a moot question, in the absence of any authority to the contrary, whether one partner can claim damages against another for such breach of duty as would entitle the objecting party to a dissolution. But dissolution and accounts had already been decreed in the present case irrespective of the alleged breach of 1929, and the preliminary decree awarding what was called compensation for the breaches of 1926 and 1928 had not been appealed against, though these breaches were among the many matters on which dissolution was decreed. The breach of 1929 could no longer be used for obtaining a decree for dissolution or accounts, and I do not suppose that the learned Judge really meant to imply that the plaintiffs were left without any remedy at all.

105. Manohar Lall, J. however after pointing out that the obvious remedy of a partner against a co-partner who refuses to carry out the terms of the partnership is to apply for dissolution under Section 254, Contract Act, takes the view that the aggrieved partner cannot "also claim damages against his partner who wilfully breaks the terms of the partnership." But, it is by no means clear whether the learned Judge meant that no compensation could be claimed for the breach of 1929 even though the plaintiffs had already obtained a decree for dissolution and accounts; and the case he next proceeds to refer to, *Dean v. Macdowell* (1878) 8 Ch D 345 seems to show that such a claim does lie. For, that was a case in which, after the expiry of the terms of a partnership, the plaintiffs discovered that during the partnership the defendant had, in spite of a covenant "not to engage, directly or indirectly, in any business except upon the account and for the benefit of the partnership," been engaged in another business in which he had made profits.

106. They then filed a bill to compel the defendant to account to the partnership for such profits and also brought a supplemental action claiming that the defendant's interest in the other business formed part of the partnership assets. Both were dismissed by Jessel M.R. who said that it did not appear that the defendant had damaged the partnership at all; and in upholding his decision, James L.J. endorsed the observation of the Master of the Bolls that you cannot extend the cases with regard to a share in the profits to a case in which as between the parties there really was nothing but a breach of covenant which could not have resulted in the slightest loss to the partnership, and added that if it could have been shown that the breach led to the covenant or neglecting the business of the partnership, "that would have been a matter for an action for damages if it could have been alleged or shown here." This is sufficient to show that dissolution is not the only remedy available for a breach of covenant by a partner, if that is what Manohar Lall J. really meant to hold, especially regarding the breach of 1929. But if the learned Judge meant no more than that there should have been a suit for damages for this breach, I have already shown, as regards this question of procedure, how in the circumstances of this case the application of April 1931 was not insufficient.

107. What Wort J. and Manohar Lall J. probably had in mind was the rule strikingly illustrated in a case already referred to by me, Santhanakrishna Naidu v. Chellappa Aiyar MANU/TN/0420/1926 : AIR (1927)Mad 650, in which a suit was brought by one partner against another for damages for breach of certain covenants in the partnership deed. This was dismissed on the ground that the proper course was to bring a suit for general accounts and debit the defaulting partner with any loss that might have been incurred by his action, in the general accounts; and the reason given was that if (except in certain special cases) a suit for damages alone regarding one item is allowed to be maintained then it might be that a partner may be decreed to pay a sum of money, whereas when the 'general accounts are taken and the whole profits ascertained, payment may be due to him. The present suit was not of the character disallowed in the Madras case; and the plaintiffs' claim for compensation for 1926 and 1928 is in any event res judicata.

108. But the Madras ruling makes it clear that a claim for damages for breach of covenant by a partner does not disappear when accounts are taken (upon a dissolution or otherwise), though where the claim is advanced in the suit for (dissolution or) general accounts, it may be included in the decree under "just allowances," as was done by Lord Buckmaster in Krishnamachariar v. Sankara MANU/PR/0045/1920 : AIR (1921) PC 91.

If the breach is subsequent to the institution of the suit for dissolution and the claim is advanced while accounts are being taken under the preliminary decree, the aggrieved partner must, in my opinion, get his damages or compensation, whether by a separate suit or (where as is the case here the preliminary decree is in sufficiently wide terms) by an application in the proceedings that lead to the final decree.

109. The question next arises whether the damage or compensation for such a breach is rightly found by calculating the loss of profits that would have been earned but for the breach, a mode of calculation conveniently referred to as accounting on the footing of wilful default, and commonly adopted in Cases against trustees and usufructuary mortgagees. Mr. P.R. Das contends that even if the managing partners be liable in damages for breach of covenant as regards their failure to work with gur in 1929, they are not liable to account for profits on the footing of wilful default, since they were not trustees, and even as usufructuary mortgagees or mortgagees in possession they did not render themselves liable to account on such a footing. There is no dispute that the partners were not trustees; and notwithstanding Clause 5 of the mortgage bond, it seems to me, that the mortgagees were not in possession as mortgagees 'Of the partnership business, which was confided to the managing partners only. But this does not, by any means, dispose of the matter. "Losses attributable to one partner's misconduct or negligence," (to quote the last marginal note at p. 459 of Edn. 10 of Lindley on Partnership) are governed by the rule in Bury v. Allen (1845) 1 Coll CC 589 at page 604:

Suppose the case of an act of fraud, or culpable negligence, or wilful default, by a partner during the partnership, to the damage of its property or interests, in breach of this duty to the partnership; whether at law compellable, or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect.

110. This is indisputable law. Mr. P.R. Das has argued that the plaintiffs' case about the breach of 1929 was a case of fraud. But neither in the plaint nor in their application of 27th April 1931 did the plaintiffs charge the managing partners with

fraud. The plaint spoke of the gross misconduct and negligence of the financiers and of the damages which the plaintiffs had suffered owing to such gross misconduct and negligence. We have already seen that the actual claim in the plaint was not one really for damages apart from dissolution and accounts, but for the plaintiffs' share of the profits that would have been earned if the managing partners had worked with gur according to their covenant. In their application of April 1931 plaintiffs said that even after the institution of the suit the defendants did not work the Bhatni factory with gur in 1929 and that this non-working was deliberately and illegally done by them in contravention of the express terms of the deed of partnership and without the consent or approval of the members of Noori Mian & Co. as laid down in the partnership deed.

111. In their answer the defendants claimed that as managing partners they had "acted bona fide in view of the prevailing market rates of gur in not working the Bhatni Factory with gur," These pleadings do not raise any question of fraud at all, though Mr. Das has argued that the absence of bona fides is the same as fraud, in order not indeed to show that the application of April 1931 should have been thrown out, as Manohar Lall J. was apparently inclined to hold, on the ground that it did not (by itself) give any particulars of the fraud, but to establish that the managing partners who might in case of fraud have been liable to account for profits that were not made were free from such liability because they acted bona fide.

112. But the pleadings do raise a question of wilful default by the managing partners to the damage of the interests of the partnership in breach of their duty to the partnership, and it seems clear that if this is established, the managing partners were in the words of Knight Bruce V. C., compellable to compensate or indemnify the partnership for the damage caused by their wilful default. *Bury v. Allen* (1845) 1 Coll CC 589 was decided in 1845, and when Knight Bruce V.C. spoke of 'wilful default' in that case, it is not to be supposed that he used the words in any very technical sense such as may since have become associated with them; he also spoke of culpable negligence, and I take the expression 'wilful default' in the context to mean some wilful misconduct, some failure to do one's duty purposely and wilfully.

113. Supposing such wilful default is established (a point which will be dealt with later on), how is the liability of the managing partners (who made the default) to compensate or indemnify the partnership to be worked out? The lower Court did this (as had been done for 1926 and 1928) by finding out what profit the partnership would have made if the managing partners had done their duty and worked with gur; and the appellants have not been able to suggest any other possible method in a case of wilful default.

114. Manohar Lall J. seems to have thought that this method did not give "actual" damage but involved a hypothetical element for which there is no warrant in law. But even in *Cragg v. Ford* (1842) 1 Y & CCC 280, referred to by the learned Judge, there was a hypothetical element--the amount of £1202 5s. 9d. which the 47 bales would have produced if the defendant had sold them on 16th December 1818 (instead of waiting till 1827); and what the defendant would have been charged with was the excess of this hypothetical amount over the actual sale proceeds, £123 3s. 11d., if he had been shown to have done anything which would throw all the consequences of the delayed sale on him alone. What Lord Atkinson called a ruling principle and a just principle in *Wertheim v. Chicoutimi Pulp Co.* (1911) AC 301 is the general intention of the law that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same

position as he would have been in if the contract had been performed.

115. It seems to me that this necessarily involves a hypothetical element except in the few cases where the breach relates to ascertained sums of money. In *Sasti Kenkar v. Man Gobinda* MANU/BH/0077/1919 : AIR1919Pat386 , referred to by Manohar Lall J. the damage could be called actual because it related to specific sums of money which ought to have been but were not recovered for the partnership. But in the majority of cases, where loss results from non-performance, one can only estimate its extent and the consequent compensation by considering what would have happened if the contract had been performed, and with the utmost respect for Manohar Lall J., I conceive that such claims cannot be rejected merely on the ground that the loss is not actual in the sense in which that learned Judge seems to have used the word. Another objection to the method adopted by the lower Court is that, as observed by Wort J. the Subordinate Judge has proceeded *ex post facto* and condemned the defendants for not working gur because as it turned out, sugar could have been manufactured from gur profitably,

although when the season commenced in November 1928 it was the opinion of the defendants in consultation with the plaintiffs that sugar could not be manufactured from gur at a profit. It seems that the plaintiffs to a very large extent acquiesced, in the sense at any rate that they were not prepared to give any definite instructions to the defendants.

116. The opinion of the defendants and the plaintiffs' acquiescence are questions of fact that will be dealt with later. As to damage *ex post facto*--or as Manohar Lall J. puts it, "upon a priori reasons on the *ex post facto* principles"--the loss caused to the partnership has been taken to be equal to the profits that would have been earned if Bhatni had been worked with gur in June-October 1929; but this has been done after first ascertaining that on the figures available to the managing partners in the cold weather of 1928-29 when the requisite gur was to be purchased and stored, they had reason not really to apprehend any loss but to expect a profit, though only a comparatively small profit of Rs. 21-11-0 per hundred maunds of gur which would have cost over Rs. 500 for purchase and manufacture. The managing partners were under an obligation to work with gur unless the condition of the market held out no hope of profit. For deciding whether to work in the coming June-October, the relevant time was the previous cold weather when gur was to be purchased and stocked for use in the working season.

117. Though the decision was to be made in the preceding cold weather the loss of profit to the partnership could properly be, and has in fact been, calculated, not from the forward figures then available but from the rates actually prevailing in the working season. No liability to pay compensation would, of course, have arisen, if the cold weather rates had shown no prospect of profit; and even if any arose on those figures, it was liable to be nullified by an actual fall of the sugar market, For, had the actual prices of the products-sugar, refined molasses etc.--in the working season June-October been so low as to leave no profit, there would, of course, have been no basis for a claim for a share of the profits or equivalent compensation for non-working. But I am unable to see why this last consideration should, when the forward rates in the cold weather have first been found not to be such as to hold out no prospect of profit, lead to our withholding compensation to an extent determined on the basis of the actual prices of the products in the working season and an assumed working of the mill to its full capacity. The expressions *ex post facto* and *a priori* do not, by themselves and apart from the view that the learned Judges apparently took

of the facts, seem to me to provide any reason for condemning the only method that anybody has yet suggested of working out the compensation in this case.

118. Mr. P.R. Das has also argued that plaintiffs are not under Section 73, Contract Act, entitled to compensation on the basis of loss of those profits which might have been earned, because such loss could not have been in the contemplation of the parties when they made the contract and cannot be said to have naturally arisen in the usual course of things from the managing partners' breach of the covenant to work with gur. He cited in support *Madras Railway Co. v. Govind Rau* (1898) 21 Mad 172, a case which corresponds very closely with Illustration (q) to the Section, though the latter deals with a case against a supplier instead of a carrier of goods. But it is impossible to imagine--nor do the appellants suggest--what damage--in case of a breach of the covenant in question--other than the loss of profits that might have been earned could have been in the contemplation of the parties when they made the contract, or what damage, if not the loss of profits, would have naturally arisen from the breach. Ours is (unlike Illustration (q) referred to above) not a case of any special circumstances, known to one party to the contract and not communicated by him to the other, and thus leading to remote damage as it is often called, i.e. damage which could not have been in the contemplation of the latter in case of a breach.

119. Nor has Mr. Mitra, who replied for the appellants, been able to suggest how the compensation to which the plaintiffs might be entitled by reason of the managing partners breach of covenant can possibly be calculated except by working out the loss of profits. Where no profits were actually made, they must (as I have already shown) be estimated, and I am unable to see why this principle should not apply merely because this was a partnership action. The wilful default spoken of in *Bury v. Allen* (1845) 1 Coll CC 589 may, in some cases, result in actual damage; but it will at least as often lead to damage which can only be estimated because it arises from the failure to do work which ought to have been done. If this involves what has been called accounting on the footing of wilful default, there can be nothing to take exception to it if it should be by reason of their wilful default that the managing partners are held liable. In my opinion, therefore, compensation for 1929 on the lines adopted below was permissible as a matter of law.

120. Turning now to the question whether there was wilful default on the part of the managing partners in their failure to work with gur in 1929, it is necessary to refer first to a small controversy before me about the meaning of one expression in the third clause of the partnership deed. I have had the whole clause translated by an official translator of this Court at the instance of the parties, and this translation, which the parties have substantially accepted, runs as follows:

It shall be incumbent upon the second party to run both the mills throughout the season every year with sugarcane and molasses. If at any time, on account of dullness of the market, the rate of molasses be such that there be no hope of profit in manufacturing sugar with molasses, then in that case manufacture of sugar with molasses may be stopped by consultation among (with the consent of) the parties. In any other case, the said mills shall not be closed. Of course, if such circumstances arise, as for instance celestial and terrestrial calamities and strikes in railways, and mills etc., which may be beyond the control of the second party and on account of which the work of the said mills cannot be carried on, in that case also the work can be stopped.

121. As regards the words "(with the consent of)" in the above translation, the official translator notes "There are no words in the vernacular for the words within the brackets. But such is the implication." The last sentence of the clause regarding celestial and terrestrial calamities requires no consideration. The first sentence imposes upon the second party a positive obligation to run both the mills throughout the season with (in particular) gur: and the third sentence makes this emphatic by providing that in any event other than that dealt with in the second sentence "the said mills shall not be closed." The second sentence provides for the stoppage of manufacture with gur "by consultation among (with the consent of) the parties." But this is subject to the condition given at the beginning of the sentence

if at any time, on account of dullness of the market, the rate of molasses be such that there be no hope of profit in manufacturing sugar with molasses.

122. It has been contended on behalf of the appellants that "consultation (mashwara, in the original) among the parties" does not import agreement among them, and that the sentence only requires the appellants to consult the owners but does not oblige them to obtain their consent. It does not seem to me, that this is a very reasonable construction of the sentence, for there could be little point in requiring the appellants merely to consult the owners in the contingency specified. It is true that the appellants were themselves interested in earning profits, but it must not be forgotten that the owners were even more interested in the matter because not only was their mortgage debt (which carried interest at nine per cent, per annum) to be paid off from three-quarters of their moiety of the profits but the partnership was also to continue until the mortgage debt was paid off. The official translator says that the implication of the word "mashwara" in the context is consent of the parties. I find no reason to doubt this, but I feel, at the same time, that if the parties meant consent as distinguished from consultation, it would have been better if they had used the former word. I propose therefore to take it (as urged by the appellants) that they were required not to obtain the consent of the owners but merely to consult them. Even so, however, it must be borne in mind that the authority given to the managing partners to stop the manufacture of gur by consultation was subject to the condition precedent that the rate of molasses for the time being "be such that there be no hope of profit in manufacturing sugar with molasses."

123. It appears that the decision to work that Bhatni Factory With gur in 1929 had to be made in the cold weather of 1928-29 when the gur was to be purchased and stored. It may be observed in passing that this meant the locking up of capital until the time came to work the gur. Some time in January 1929, the managing partners sent the General Manager, Gurdayal Srivastava, to one of the partners of Noori Mian & Co., Shaikh Khuda Baksh, plaintiff 2, to draw attention to the then rate of gur and the present and future rates of sugar, and to consult him as regards the manufacture of sugar with gur because the forward rates for Java sugar up to the next cold weather appeared (so they said) to hold out no prospect of profit but an apprehension of loss. Gurdayal understood from Khuda Baksh that the latter did not think it quite proper to express an opinion in view of the partnership action that was pending, but that

whether the work be continued with gur or not, the result was the same for Messrs. Noori Mian & Co., because even if the work (of preparing sugar) from gur be stopped and all the staff of the mill be retained as before, when no reduction in expenditure was made even in case of no work with gur being done in spite of the promise, it was better for Messrs. Noori Mian &

Co., to suffer loss by doing work, if loss had to be borne, instead of suffering loss by incurring expenditure for nothing.

124. This does seem a little vague, but it is plain enough that Khuda Baksh was referring to an unfulfilled promise of reduction of staff (which staff would be paid whether or not Bhatni was worked with gur) and that he thought that the expenditure on the staff at least would be met by working with gur: there was no thought of loss, apart from the establishment cost, if gur were worked. The managing partners then wrote a letter No. 13/29 of 26th January 1929, to Noori Mian & Co., enclosing a cutting from the Amrita Bazar Patrika which gave forward quotations for white Java sugar, drawing attention to Clause (3) of the partnership deed, and enquiring whether gur should be further purchased or not. I agree with Mohamad Noor and Manohar Lall JJ., that Noori Mian & Co., did receive this letter, though they do not admit it; and though it is not formally in evidence, I have looked into it at the instance of the appellants in view of Ex. A 2 and the appellants' petition of 17th September 1931 below (printed at page 34, while the letter itself is at page 33, of Parts I and II of the paper-book in Letters Patent Appeal 59 of 1933). The plaintiffs sent no reply to this letter, and Gurdayal was asked to go again and try to obtain a proper reply by conversation with the owners. He thus saw four of the owners or their representatives, and learnt from them as follows:

127. We shall not give any reply to the said letter or any information privately in case of litigation. If Messrs. Kishorilal Makundilal think it necessary they may get this matter adjudicated upon by Court. Otherwise they may do as they think (fit). We have beforehand submitted a petition in Court making mention about gur, with a view to safeguard against loss to us. It would be better that the matter be decided there so that whatever decision may be arrived at may be clear. Otherwise as to the opinion given privately, firstly law points as regards the accrual of cause of action are a hindrance to our giving a definite reply; secondly, in spite of the fact that in view of the present selling rate of gur there is no hope of profit for making sugar from gur, yet if the work be done very efficiently and economically, the expenditure on the staff may of course be met, and if there be an occasion of a rise in the price, there may be profit also; otherwise in present circumstances there is at present surely an apprehension of loss of interest on the capital involved. Still, in view of the consequences of verbal conversation for the most part during the period prior to making claim, we know that nothing can be settled by oral and private conversation, when we deny the present partnership of Messrs. Kishorilal and Makundilal on the basis of the claim. Such being the case we are not bound to give any opinion and we will not give any out of Court. Still even if there would have been no litigation, in view of the fact that the expenditure would be the same whether the work with gur be done or not, it is better for Messrs. Noori Mian & Company, in view of the fact that there will be no saving in expenditure even if sugar be not made from gur and they would, on the other hand, have to bear the burden of expenditure, to bear loss by doing work instead of making expenditure for nothing, because if there be loss, they would incur loss of Rs. 1 lakh only when Messrs. Kishorilal Makundilal would bear a loss of Rs. 2 lakhs in view of the capital invested in the gur business.

I have quoted this from Ex. A1, Gurdayal's letter of 16th February 1929, to Messrs. Kishorilal Makundilal, the appellants, of which a copy, I am satisfied, was sent on by the latter to Noori Mian & Co, the next day with another letter of theirs, Ex. A2. This

last letter was sent by registered post, and it is proved that the plaintiffs refused to receive it. In this letter Messrs. Kishorilal Makundilal complained that they had not been favoured with a reply to their letter of 26th January 1929 and said that: still out of foresight we have purchased about 20,000 maunds of gur for making sugar at Bhatni Mill.

125. They also said that they were ready to say in writing what they had given the plaintiffs to understand orally through Gurdayal, namely, that if the plaintiffs replied to the appellants' letter of the 26th January "no legal benefit would be drawn (e.g.) of establishing partnership between us and you." (I must observe at once that this invitation to a reply without prejudice is not supported by Gurdayal's letter to his employers). Appellants further wrote that if they made sugar from gur, there was an apprehension, in view of the rates, of loss in case the market tended to be against them and that then the plaintiffs would blame them, but if "for any earthly and heavenly causes" there be a rise in price, plaintiffs would blame them that in case sugar would have been prepared from gur, it would have brought profit. Such being the case, we have no other alternative but to act according to your opinion, expressed before the said manager, and which has been referred to in his report, a copy of which is being enclosed. Moreover, the personal opinion of the manager is also the same as that of yours.

126. The opinion of the manager is found towards the end of his letter of the 16th February:

Without any regard being had to litigation between you and Messrs. Noori Mian & Co., I can say that it would be better for you not to work with gur in the Bhatni Mill after the sugarcane season is over, if you can hereafter retrench the expenditure on all the staff of the mill and all the other servants excepting very necessary persons.

The italics are mine and show what was really at the bottom of the trouble. Gurdayal also wrote about the "inner thoughts" of the plaintiffs that if business relations had been fair between the parties the plaintiffs would not in the circumstances have liked to work with gur without any hope of profit if they would have been sure of saving expenditure.

The learned Subordinate Judge states the result of this consultation with the plaintiffs as follows:

It cannot be said for a moment that the conversation to which Srivastava had referred in his report meant that the plaintiffs agreed that the defendants should not work the Bhatni Factory with gur as there was no chance, of profits. What this conversation really amounted to was that the plaintiffs declined to give any private reply in view of the suit pending between the parties, wanted the defendants to get the matter cleared up through the Court, and finally expressed an opinion that even if the prospects were not very bright, the pay of the staff at least could be secured by a careful and economical working, while there was a chance of profit if the market improved, and that if there had been no suit between them, Noori Mian & Co., should have given the advice, that the mill should be worked with gur.

This by no stretch of language can be said to mean that the plaintiffs agreed that the mill should not be worked with gur in that year as it would not be profitable to do so.

127. Manohar Lall J. seems to have accepted much of this, and in my opinion, the learned Subordinate Judge has stated the result quite correctly in the above passage. When the managing partners thus attempted to consult the owners, the latter, it is clear, declined to give a formal reply because their case was that the partnership was already at an end, a position which receives some support from the fact that it was on the acts and omissions of the managing partners prior to the institution of the suit that the partnership was actually dissolved by the Court. But the dissolution took effect from the date of judgment, namely 30th June 1930. Defendants had therefore a right to carry the partnership on during the pendency of the suit, and they did so. The plaintiffs, when consulted, did not admit the right of the managing partners to obtain their opinion, but nevertheless indicated pretty clearly that the Bhatni Factory should be worked with gur if only to meet the cost of establishment. The long extract given above from Gurdayal's letter, if carefully read, show that the plaintiffs did not say anything to indicate that in their opinion working with gur might lead to loss and might not go to meet the costs of the establishment.

128. They were for working if only to meet this cost, and I hold with the learned Subordinate Judge that they did not agree that there was no prospect of any profit from working with gur.

The learned Subordinate Judge accepted the appellants' contention that the plaintiffs' refusal to give an unequivocal reply to the defendants' query whether the factory should be worked with gur in 1929, entitled the defendants to use their own discretion in the matter. But he only accepted it sub modo, accepted it in the sense that it did not make it "less incumbent upon the defendants to decide the question with such prudence and care as they possessed." He then examined the materials available to the defendant at the time the decision whether or not to work with gur had to be made, and his conclusion was that "there was a prospect of profit of Rs. 21-11-0 per hundred maunds of gur," and that

there was absolutely no reason having regard to the positions of the sugar and gur markets, why the defendants should have decided not to work Bhatni with gur in 1929.

129. It has not been suggested before me that there is any mistake in the Subordinate Judge's calculations from the figures available to the defendants in the early part of 1929. But it has been argued that the Subordinate Judge paid no attention to such evidence as the admission of Gurdayal in cross-examination that Panchrokhi and 8 or 10 other named composite factories did not work with gur in 1928-29 and that the Gugli composite factory worked with gur at a loss. Gurdayal, however, who was examined as a witness for the defendants, had further to admit that there might be reasons, with which he was not acquainted, which led those factories not to work with gur in the 1929 season; and as to Gugli, Syed Hossain, a witness for the plaintiffs, said that he had come to know from Gugli Mian that the factory worked with gur in 1928-29 at a profit.

130. It has been urged that Syed Hossain's statement is not supported by the evidence of any other witness. But it must be remembered that Gurdayal himself did not claim to have personal knowledge of the Gugli factory working at a loss that year. Gurdayal also said that the general impression was that composite factories did not work with gur as there was no likelihood of profit. But this "general impression" is not supported by any details. I am not therefore prepared to accept the appellants' contention that even though calculation on the materials then available shows a profit

of Rs. 21-11-0 per hundred maunds of gur, the defendants honestly believed that working with gur would be attended with loss. The history of gur-working at Bhatni during the partnership, which has been briefly referred to by the Subordinate Judge and which will be found in detail in the judgment of 30th June 1930, at pages 433-53, see especially page 444; also page 505 of parts I and II of paper-book of Letters Patent Appeal No. 60 of 1933) goes far to indicate that the managing partners would not work with gur because the profits were small rather than that they really believed on the figures then available that the factory would suffer actual loss on the working of sugar with gur in the coming season. Much has been made of the fact that if there had been a real prospect of profit from working with gur, the whole profit would not have gone to the plaintiffs. But as I have already shown, the plaintiffs had good reason to take what profit they could get, while the appellants are drawing 9 per cent, per annum on their mortgage money, so that they would not be too ready to lock up any capital in gur unless they expected a larger profit than 9 per cent from such expenditure.

131. It has been contended that the appellants were not required to embark upon a risky speculation and hazard their money in gur and that they are not liable to pay compensation for non-working if they honestly believed that working with gur would be attended with loss. Apart from the fact that as the Subordinate Judge has (in effect) found, they could have had no such honest belief--a finding which I accept--it must not be overlooked that the managing, partners had not only undertaken to finance the partnership business but had also bound themselves to work Bhatni with gur unless a fall in the market held out no hope of profit, etc. There was no such fall, and even an honest belief to the contrary, if any, would, in my opinion, have been little justification for breach of the covenant. Mr. P.R. Das has cited Mahadev Vithu v. Ganoo Changoo MANU/MH/0018/1925 as a case in which a defendant in a suit for accounts upon a dissolution of partnership was not held liable for the probable loss sustained' by the firm owing to his neglect or failure to ply a boat for hire in accordance with the partnership agreement. But this was because it could not be said in the case "that the defendant has been guilty of fraud, culpable neglect or wilful default." In the present case, however the lower Court has in substance found repeated, wilful default, and not mere negligence. In his somewhat confused language (at any rate as it reads in the translation in the paper-book at p. 37 of Part III in Letters Patent Appeal No. 59 of 1933) Gurdoyal was told by the plaintiffs:

135. If Messrs Kishorilal Makundiram think it necessary they may get this matter adjudicated upon by the Court; otherwise they may do as they think (fit).

This seems to mean that if the defendants were to stop working with gur, they would be doing so at their own risk and would have to take the consequences. It clearly does not mean that the plaintiffs left the matter to the discretion of the managing partners in the sense of agreeing to be bound by it. The contention that the plaintiffs' refusal to give an unequivocal reply entitled the defendants to use their own discretion in the matter is not, in my opinion, altogether correct. though the defendants undoubtedly did attempt to con-suit the plaintiffs, consultation by itself was not sufficient to justify the decision to refrain from working with gur, for, as I have already pointed out, when dealing with Clause 3 of the partnership deed, it was a condition precedent to the stoppage of working with gur by consultation that on account of the dullness of the market the rate of molasses for the time being should "be such that there be no hope of profit in such manufacture."

132. What happened was that the prospects were not "very bright" in the sense of profits that the defendants considered sufficiently attractive. But this did not, whether the plaintiffs did or did not give an unequivocal reply, entitle them under Clause 3 of the partnership deed to stop the manufacture from gur. In my opinion, moreover the plaintiffs, reluctant as they were (not altogether without reason) to admit that the partnership was still in existence, indicated an unmistakable preference for working with gur if only to meet the establishment cost.

It has been argued that the plaintiffs ought to have insisted on Bhatni being worked with gur and that as they did not do so, they are entitled to no compensation because if loss had resulted from actual working, they would have been free to repudiate it, Manohar Lall J. accepted this and held that plaintiffs had placed the defendants on the horns of a dilemma. But with all respect, it does not seem to me that on Clause 3 of the partnership deed plaintiffs could have escaped their liability for a half of the loss if the defendants had worked with gur and the work had resulted in loss.

133. The clause laid a positive obligation on the managing partners to work with gur, and barring the excepted contingencies said that "the said mills shall not be closed" and the exceptions did not leave it open to the plaintiffs to repudiate their proportionate liability in case of loss from actual working. The plaintiffs' failure clearly to say 'no' to the proposal of the managing partners that the factory should not be worked with gur cannot be construed into an acceptance, nor has it been contended on behalf of the appellants that it should be so construed. But Mr. P.R. Das has urged that the plaintiffs were guilty of laches and that this saves the managing partners from their liability to work with gur. Reference has been made to a passage from Lindley at page 560:

The doctrine of laches is of great importance where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it...court will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success.

134. But this doctrine seems to apply to cases where the plaintiff has by his conduct induced the defendant to suppose that the plaintiff had abandoned the common undertaking, usually in cases of a highly speculative character. In the present case, the plaintiffs did say and had even sued on the footing that the partnership was already at an end and they were so far right that the Court decreed dissolution on grounds (necessarily) prior to the institution of their suit. Defendants however insisted on carrying on the partnership and never supposed that the plaintiffs were no longer partners; and on the deed of partnership there was no question of plaintiffs leaving the defendants unfairly to do all the work and then, when there was a profit, coming forward to claim a share. Wort J.'s observation that "the plaintiffs to a very large extent acquiesced, in the sense at any rate that they were not prepared to give any definite instructions to the defendants" does not (speaking with all respect) allow for the fact that under Clause 3 the managing partners had bound themselves to work with gur irrespective of any instructions from the plaintiffs; and I have accepted the appellants' own contention that they were entitled to stop working with gur after consulting the plaintiffs, even without their consent, provided the condition of the market held out no hope of profit. On this footing the plaintiffs had no right to give any instructions at all. Appellants have referred to the following passage from Lindley (page 380):

As observed by Lord Eldon in *Const v. Harries* or *Dale v. Hamilton* (1847) 2 Ph 266 a partner who complains that the other partners do not do their duty towards him must be ready at all times and offer himself to do his duty towards them.' But if a partner has been set at defiance by his copartners; if they have denied that he is a partner, and that he has any right to interfere in the partnership, they can derive no advantage from the circumstance that he has not performed his duty to them.

135. The case before us, however, is quite unlike (1847) 2 Ph. 26626, cited in *Lindley*. The plaintiffs, having already brought a suit on the footing that the partnership was at an end, could not very well offer a formal opinion on the proposal of the managing partners not to work with gur in 1929. Their suit was justified, not indeed on the footing that the partnership had been dissolved by the death of Babu Kanhaiya Lal, but on various grounds afforded by the conduct of the managing partners. If they had accepted the proposal not to work with gur, they could not, of course, in spite of Clause 3, have claimed compensation for non-working. But there was nothing in the partnership deed to oblige them to accept it. The entire financing and working of the business was in the hands of the managing partners, and according to the case of the appellants themselves, which I have accepted, even if the plaintiffs had unequivocally rejected the proposal of the managing partners not to work with gur, this would have been immaterial, for their right to refrain from working with gur depended not on the consent of the plaintiffs but on a mere consultation with them. The appellants contend that the plaintiffs were bound to allow themselves to be consulted but in effect refused.

136. As a matter of fact, the plaintiffs did in my view express an opinion against the stoppage of work with gur, though in a somewhat non-committal manner, because of the suit instituted by them. But supposing the plaintiffs refused to be consulted, the appellants would be no better off than if plaintiffs had been consulted, and the liability of the managing partners for breach of covenant would still turn on whether the condition precedent in the second sentence of Clause 3 was fulfilled, and if it was not, on whether the failure to work with gur constituted wilful default within the rule laid down in *Bury v. Allen* (1845) 1 Coll CC 589.

137. It has also been argued that the plaintiffs' failure to give an unequivocal reply to the query of the managing partners makes the doctrine of frustration of contract applicable to the case: as Manohar Lall J. said, Clause 3 contemplates a normal state of affairs when the parties are on terms of businesslike amity and the partnership is going on smoothly, and the clause had no application when an abnormal situation arose on the institution of the plaintiffs' suit rendering consultation between the parties impossible. But the doctrine of frustration only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract; "interference leaving a considerable part capable of performance will not be an excuse" (*Pollock on Contract*, Edn. 10, p. 305). Reference has also been made to para. 298 at p. 220 of the Hailsham Edition of *Halsbury's Laws of England*, Vol. 7. But this again deals with the release of the promisor from his obligation to perform his promise. "Where the conduct of the promisee has rendered performance impossible," and "impossibility arising from the promisor's own act or default is not in any case an excuse for non-performance of his contract."

138. Now, what was the obligation from which it is claimed the managing partners were released by reason of the plaintiffs' failure definitely to say "no" to their proposal not to work with gur? Surely, it cannot be the covenant of the managing

partners to work with gur. There is nothing in Clause 3 of the partnership deed which makes it possible for the plaintiffs to prevent the managing partners from working with gur, and I have already shown that while according to the appellants, themselves the managing partners were not bound to obtain the consent of the plaintiffs to a stoppage of work with gur, mere consultation with the plaintiffs was not sufficient to justify giving up manufacture with gur as there was the condition precedent about the dullness of the market, etc. According to the managing partners themselves the partnership was still continuing, and in the correspondence of 1929 they took up the position that Clause 3 of the partnership deed was still applicable. The situation, such as it was, was moreover brought about by the managing partners themselves, as is shown by the fact that it was on their acts and omissions before the institution of the suit that the partnership was dissolved.

139. The failure of the plaintiffs to give a formal, unequivocal reply to the query of the managing partners--and this is the utmost that can be properly said against the plaintiffs--did not affect the working of the mills; the managing partners claimed to be entitled to work them under the partnership deed and went on doing so. I am therefore unable to hold that the doctrine of frustration has any application to the circumstances of the case.

140. Reference was also made to Section 56, Contract Act, but the covenant to work with gur had by no means become impossible of performance by reason of the failure of the plaintiffs to say "no" definitely to the proposal of the managing partners. Mr. Mitra, who replied for the appellants, also referred to Section 54 of the Act, but the obligation undertaken by the managing partners to work with gur does not seem to me to have been a matter of reciprocal promises at all within the meaning of that Section. It is not as if the plaintiffs were not entitled to claim performance until they themselves gave an unequivocal answer when consulted in the excepted contingency, nor was the exception itself applicable since (as has been already shown) the condition of the market was not such as to hold out no hope of profit from the manufacture of sugar with gur. My conclusion on this part of the case is that the appellants cannot escape from the consequences of their wilful default merely because the plaintiffs did not insist on Bhatni being worked with gur in 1929. The wilful default itself has been clearly established, and the appellants' objection on the score of jurisdiction and the measure of damages have all been found untenable. The appeal therefore fails and must be dismissed with costs.

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