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not having been complied with, the pre-emption suit stands dismissed with costs. I therefore, dismiss the appeal, but in the circumstances of the case, leave the parties to bear their own costs of this appeal.

I have refrained from going into and determining the question of the appealability of the orders of the trial court and of the lower appellate Court. As the point was not mooted before me, I have not considered it desirable, to raise this question *suo motu* and to rest my judgment upon a finding on this question.

APPELLATE CIVIL

Before Tek Chand, J.

MANSHA RAM,—*Plaintiff-Appellant*

versus

TEJ BHAN,—*Defendant-Respondent*

Regular Second Appeal No. 472 of 1956, with Cross-objections.

1957

Feb. 18th

Indian Partnership Act (IX of 1932)—Section 37 and Indian Trusts Act (II of 1882)—Section 88—Doctrine of attributable share—A partner retaining assets of the firm after dissolution and utilizing for his own benefit—Liability of, towards other partner—Section 13(b)—Partners contributing unequally—No agreement regarding the share of profits—Whether entitled to share profits equally.

Held, that when on the dissolution of a firm, one of the partners retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he is liable to account for them to the other partner on the basis of the doctrine of attributable share, which is justified on the ground that the profits are accretions to the property which has yielded them, and ought to belong to the owner of such property in accordance with the maxim, *accessorium sequitur suum principale*. The outgoing partner has the option either to claim such share of the profits as may be attributable to the use of his share of the property of the firm or interest

at the rate of six per cent per annum on the amount of his share in the firm's property and he is not bound to make his election till the profits are determined.

Held, that section 88 of the Indian Trusts Act enjoins upon the partner who remains in possession of the partnership assets *uberrima fides,* as regard the interests of the other partner. The former must account for the profits which have been accruing as a result of the working of partnership assets attributable to the share of the former partner. Strictly speaking, a partner is not a trustee of the other partner, but there is no denying the fact, that the partners stand in a fiduciary relation to one another and in such a case equity will never permit the surviving partner to trade, or to utilize the property of the other for his exclusive personal profit. If he makes a profit, it must be paid over to the owner of the property, the use of which produced the profit.

Held, that it is not unreansonable to infer, in the absence of evidence to the contrary that the partners have agreed to consider their contributions as of equal value, although they may have brought in unequal sums of money, or be themselves unequal as regards skill, connection, or character. Where, therefore, partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection or character, whether they have or have not laboured equally for the benefit of the firm, their shares will be considered as equal unless some agreement to the contrary can be shown to have been entered into.

Second Appeal from the decree of the Court of Shri Durga Parshad Sodhi, Senior Sub-Judge, Ambala, with enhanced appellate powers, dated the 28th day of March, 1956, affirming decree of Shri J. M. Tandon, Sub-Judge, Ist Class, Ambala, dated the 9th February 1955, whereby the plaintiff was granted a preliminary decree for dissolution of the partnership and rendition of accounts against the defendant. It was further ordered that the partnership of Mansha Ram and Tej Bhan stood dissolved on 4th April, 1953, and Shri Ram Sarup, Advocate was appointed a Local Commissioner to go into the accounts and it was also directed that Local Commissioner would go into the accounts of M/s Mansha Ram Tej Bhan up to 7th April, 1953, and also into the accounts of

M/s Mansha Ram and Sons up to the date he submits his report. It was further directed that the defendant would be entitled to the profits and losses of M/s Mansha Ram Tej Bhan up to 7th April, 1953, to the extent of 1/2 share and in Mansha Ram and Sons the defendant would be entitled to such share of the property made since 8th April, 1953, as might be attributable to the use of his share of the property of the Firm Mansha Ram Tej Bhan or to the interest at 6 per cent per annum on the amount of his share in the property of Firm Mansha Ram Tej Bhan up to the final decree, with the direction that the parties would bear their own costs.

The costs of the Ist appellate Court were to be paid by the plaintiff appellant to the defendant-respondent.

F. C. MITAL and ANAND SARUP, for Appellants.

SHAMAIR CHAND and D. R. MANCHANDA, for Respondents.

JUDGMENT.

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TEK CHAND, J.—This regular second appeal presented by the plaintiff arises out of a preliminary decree for dissolution of partnership and rendition of accounts passed by the trial Court and affirmed by the Senior Sub-Judge, Ambala, on appeal.

Plaintiff- Mansa Ram alleges that in June, 1952, he and defendant Tej Bhan orally entered into a partnership, the object of which was to carry on the business of supplying bajri, ballast, shingle and stone-boulders, etc., to the Public Works Department. The partnership was styled as Messrs Mansa Ram-Tej Bhan, 4, Rajas Road, Dehra Dun, and the business done was of tendering and executing contracts for supply of bajri to various branches of the P.W.D. The defendant invested Rs. 13,000 as his contribution and the plaintiff's investment amounted to Rs. 4,000 only. Plaintiff contended that the share of the parties in the profit and loss of the firm was to be borne by the parties equally despite the difference in

the capital contribution. The partnership functioned at Mubarikpur and Chandigarh and the supply of bajri, was from the bed of river Ghaggar. The plaintiff alleged that the defendant being invalid could not personally work in the partnership business and did not provide for the services of a representative on his behalf. For the supply of bajri a tender was given by the parties' firm on 10th June, 1952, which was accepted by the P.W.D., Punjab, on 16th June, 1952. This business continued till 27th January, 1953, for about eight months. The terms of the partnership not having been reduced to writing, disputes arose regarding its conditions. It is stated that on 26th November, 1953, there was a meeting of the partners at Dehra Dun, but as their differences could not be amicably settled, the defendant on 27th of February, 1953, visited the work at Chandigarh, and in the absence of the plaintiff and his son Dr. Sat Parkash, removed the account books and relevant papers relating to the business of the firm on the pretence that he wanted to go through them. On 27th of February, 1953, by letter P.W. 2/1, addressed to the Punjab National Bank, Kalka, the defendant instructed the Bank not to allow any withdrawals from the current account of the firm till further instructions. Instructions to similar effect were sent to the Imperial Bank, Ambala City, by letter PW/1, dated 27th February, 1953, and also to the Imperial Bank, Hissar, by letter P.W./1, dated 19th of March, 1953. A recriminatory correspondence was also exchanged between the parties. On 11th of March, 1953, a notice was sent on behalf of the plaintiff to the defendant, complaining that the latter did not attend to the business on account of being invalid, that he had removed the account books and other records of the firm and had stopped operation of the accounts in the Banks. Plaintiff's counsel in Exhibit P. 1, also wrote, "You are further informed that my client is continuing the supplies to the department, inspite of all your obstruction, and

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shall continue to do so, unless some legal difficulties arise on account of your illegal action, for which you alone shall be responsible and you are informed that my client shall be entitled to be compensated for working the contract without your co-operation". Exhibit P. 3 is the reply sent on behalf of the defendant to the plaintiff, stating *inter alia*, that the share in profit and loss had been agreed to be in proportion to the investment, i.e., three to one and that the stamp paper for drafting the partnership agreement was purchased in Dehra Dun in the month of June, 1952, but it could not be drafted as the plaintiff stated that it had been lost. It was denied that the working had not been attended to personally by the defendant, owing to his ill health. The defendant accused the plaintiff of having resiled from the original terms, and for insisting upon new terms, which were not acceptable to the defendant. The defendant in the end stated that he was not willing to work with the plaintiff in partnership, unless proper deed was executed within a week. By notice Exhibit P. 4, dated 7th April, 1953, the plaintiff's counsel averred that the profits were to be shared half and half regardless of the actual amount contributed. The plaintiff's counsel further stated "Since your client is not willing to work in partnership with my client; therefore, the partnership stands dissolved from this date, and your client is now called upon to render accounts of the partnership within ten days of the receipt of the notice, failing which a suit shall be filed against him for rendition of accounts at Ambala Courts wherein the partnership worked" Exhibit P. 5, dated 9th of April, 1953, is a reply sent on behalf of the defendant to the plaintiff and the following, among others, are the passages, which deserve mention:—

(1) That in spite of the aforesaid notice you L. Mansha Ram have refused by your

conduct to execute the partnership agreement.

* * * * * *

(2) That you L. Mansha Ram have contrived to get the contract which had been originally taken out jointly by yourself and my client, altered in the name of M/s Mansa Ram and Sons, after receipt of my client's notice aforesaid.

(3) That the department quite illegally effected the said transfer, without the knowledge and consent of my client about which separate action is being taken by my client.

* * * * * *

* * * * * *

The defendant then called upon the plaintiff to execute a proper deed of partnership, on terms and conditions mutally agreed upon, as mentioned in the defendant's notice, dated 14th March, 1953, Exhibit P. 3, within a week from the receipt of the notice Exhibit P. 5. On 20th of April, 1953, the present suit was instituted by the plaintiff. The defendant in his written statement denied the various allegations of the plaintiff as detailed above, and averred, that the partnership had been entered into for carrying on the business of supplying bajri only to the P.W.D., and the conditions of partnership were that the tenders were to be filed in the name of Mansa Ram-Tej Bhan and the accounts were to be opened in the Banks in that name. The defendant would invest 3/4ths as against the plaintiff's investment of 1|4th and that the shares of the profit and loss would be in the ratio of 3 to 1 respectively. The defendant also alleged that the amount of investment of each of the partners was to carry interest at 6 per cent per annum to the extent

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of Rs. 10,000 and for subsequent advance at the rate of 9 per cent per annum. The defendant further contended that till the termination of partnership, and rendition of the accounts, neither of the parties would be entitled to carry on separate business of supplying bajri. The defendant admitted having taken possession of the books, and explained his conduct, by stating that had he not done so, it would have been impossible for him to prove the extent of his investment. He also stated that the partnership was continuing and had not been dissolved. He denied that it was a partnership at will, but it was during the full period of the lease of the quarry, that his rights would remain unaffected despite the plaintiff having in collusion with the P.W.D., authorities got the name of Mansha Ram and his sons inserted in place of Mansa Ram-Tej Bhan.

The additional pleas of the defendant round which the main controversy centred may be reproduced *in extenso*—

"(1) That the business is being carried on with the assets of the partnership. So, if the Court holds that the partnership is to be dissolved then the defendant is entitled to the profits in the ratio of 3 to 1, till the distribution of the assets of the partnership.

(2) That the defendant has come to know from a reliable source that the plaintiff has started depositing the amount realised from the various departments on account of the business of the partnership, in the name of Mansha Ram and Sons, without the defendant's consent. That account shall be deemed to be the account of the partnership and may be considered as such."

At this stage it is desirable to mention one important transaction. A stamped deed of partnership between the plaintiff's sons, namely, Sat Parkash, Gian Parkash, and Dharam Parkash had been executed, in which it was stated that the three brothers, who were the executants of the deed, having separated from their father Mansa Ram, intended to carrying on the partnership business the terms of which were being reduced to writing. This firm was called 'Messrs. Mansa Ram and Sons' and its business, among others, included quarrying minerals and supply works, and other such allied works. The deed was silent as to the actual contribution of each partner, although their shares were mentioned at six annas, five annas and five annas respectively in a rupee. All that was mentioned regarding investment was as under:—

> Para 6. "That whenever necessary, the partners with common consent and with consultation of each other, can raise loans from outside parties for the purposes of Firm's business and the interest on such loans shall be payable by the partnership Firm."

It is significant to note, that although the deed was executed on 23rd of May, 1953, it was provided in the deed that "the business is deemed to have commenced from 1st March, 1953." It is necessary to remember that rupture took place on 26th February, 1953, between Mansa Ram and Tej Bhan, when they met at Dehra Dun, with a view to settle the terms of the partnership before they were reduced to writing, and that on 27th February, 1953, the defendant had taken away the books from Chandigarh. The plaint in this case contains no reference whatsoever to the partnership deed constituting firm Mansa Ram and Sons. This deed was executed on 23rd May, 1953, a little over a month after this suit had been

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instituted. The trial Court in the first instance framed two issues reproduced below:—

"(1) Whether the partnership of the firm Mansha Ram-Tej Bhan is liable to be dissolved for the reasons given in the plaint? O.P.P.

(2) What are the shares of the parties in profits and losses of the partnership? O. P. Parties."

Evidence of the plaintiff was led on these two issues. After ten witnesses had been examined on behalf of the plaintiff including the plaintiff himself and his son, P.W. 7, Dr. Sat Parkash, who looked after the partnership business, an application was made for framing of additional issues which was allowed. The additional issues are as under:—

"(1) Whether allegations in paras Nos. 2, 4, 5 and 6 of the plaint are correct ? O.P.P.

(2) If additional issue No. 1 is not proved, whether the partnership is still liable to be dissolved? O.P.P.

(3) If the partnership is liable to be dissolved, then from what date it is to be taken as dissolved ? O.P.P.

(4) Has the contract of the supply of bajri by the partnership in dispute with the P.W.D. been cancelled, and if so, with what effect? O.P.P.

(5) If additional issue No. 1 is not proved, whether the plaintiff got the name of Mansa Ram and Sons inserted in place of Mansha Ram-Tej Bhan with the P.W.D.. in the old contract and if so, was it done *mala fide* ? O.P.D.

(6) Whether the work carried on by the plaintiff in the name of Mansa Ram and Sons, after March, 1953, was with property of the partnership in suit and if so, to what effect? O.P.D.

(7) Whether the plaintiff has deposited the amount realised from the various departments towards the account of the partnership in the name of Mansa Ram and Sons? O.P.D.

(8) If additional issue No. 7 is proved, could the plaintiff do so without the consent of the defendant and, if not, with what effect? O.P.P.

(9) Whether the defendant participated to transact the business of the firm Mansha Ram-Tej Bhan? O.P.D.

(10) Whether the bajri was supplied from the quarry taken on lease by the partnership in dispute to 1st Circle Patiala, 4th Sub-Division Khanauri and other persons and, if so, to whom? O.P.D.

(11) Relief.

After the additional issues had been framed, the plaintiff led his evidence and P.W. 7, Sat Parkash and P.W. 8, plaintiff himself made supplementary statements. The trial Court held that the partnership between the parties was at will and stood dissolved on 7th April, 1953. It also came to the conclusion that the firm Mansa Ram and Sons, had no capital of its own and had carried on its work with the assets of the firm Mansha Ram-Tej Bhan. The constitution of firm Mansa Ram and Sons was a device on the part of Mansa Ram to pocket the entire income of firm Mansha Ram-Tej Bhan for himself. It held, that

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under section 37 of the Indian Partnership Act, the defendant was entitled at his option to such share of the profits made since 7th of April, 1953, as might be attributed to the use of the defendant's share of the property of the firm, or to interest at six per cent per annum to be calculated on his investment. It was found that the bajri which had been supplied in the name of Mansa Ram and Sons, had been taken out of the stock of Messrs Mansha Ram-Tej Bhan from the quarry, which had been taken on lease by that firm. It was also found that the investment of the defendant in the firm was three times more than that of the plaintiff but in view of the provisions of section 13(b) of the Indian Partnership Act, in the absence of the contract between the parties, the two partners Mansha Ram and Tej Bhan were entitled to share the profits and losses equally regardless of their unequal contribution in the capital of the firm. In the result, a preliminary decree for dissolution of the partnership and rendition of accounts was passed. The partnership of firm Mansha Ram-Tej Bhan stood dissolved by 7th April, 1953, and Shri Ram Sarup Advocate of Ambala was appointed local commissioner to go into his accounts. It was ordered that the local comissioner should go into the accounts of Messrs Mansha Ram-Tej Bhan upto 7th April, 1953. It was also ordered that the local commissioner shall also go into the accounts of Messrs. Mansa Ram and Sons upto the date he submits his report, and that defendant shall be entitled to the profits and losses of Messrs Mansha Ram-Tej Bhan upto 7th of April, 1953, to the extent of one-half share and that in Messrs. Mansa Ram and Sons, the defendant shall be entitled to such share of the property made since 8th April, 1953, as may be attributable to the use of his share of the property of the firm Mansha Ram-Tej Bhan alternatively to interest at the rate of 6 per cent per annum on the amount of his share in the property of firm Mansha Ram-Tej Bhan upto the final decree. The

parties were left to bear their own costs by the trial Court.

The plaintiff instituted an appeal against the aforementioned preliminary decree and the defendant filed cross-objections. The Senior Subordinate Judge, after going through the record, held that there was ample material to justify the finding of the trial Court. He found it to have been proved that Messrs Mansa Ram and Sons had utilised the assets of the firm Mansha Ram-Tej Bhan and had supplied bajri to the P.W.D. from the same quarry which was being worked by the firm Mansha Ram-Tej Bhan. He also found that sums of Rs. 15,501-8-0 and Rs. 9,500-13-0 belonging to Mansha Ram and Tej Bhan were received by the plaintiff Mansha Ram on 7th of March, 1954, and 1st of April, 1954, respectively, which were deposited by him in the account of Messrs. Mansa Ram and Sons in Dehra Dun. According to the opinion of the Senior Subordinate Judge these sums formed the assets of the firm Mansha Ram-Tej Bhan and were utilised by the plaintiff for his own use for the business run in the name of Messrs. Mansa Ram and Sons. He also found that Messrs. Mansa Ram and Sons supplied bajri out of the quarry of Radhika Rani which had been taken on lease by the firm Mansha Ram-Tej Bhan from 24th October, 1952 to 31st October, 1953. The plots of land near Ghaggar and Chandigarh Railway Stations which had been taken on hire under an agreement of lease from the President of India by firm Mansha Ram-Tej Bhan for keeping stock of bajri removed from the quarry were utilised by Messrs. Mansa Ram and Sons. The latter firm, as found by both the Courts below, did not deposit any security with the department whereas the security which had previously been deposited by the firm Mansha Ram-Tej Bhan remained lying with the department. The suggestion is that that security was utilised for the benefit of Messrs. Mansa Ram and Sons. The story

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of the plaintiff's witnesses that Messrs. Mansa Ram and Sons had any independent capital of Rs. 25,000 out of which Rs. 10,000 had been borrowed by Shri Sat Parkash from his mother-in-law and the other Rs. 15,000 had been borrowed by him from one Lakhmi Das has been rightly rejected as totally unproved. The Senior Subordinate Judge held that as the accounts were originally kept by the plaintiff and subsequently the accounts were taken possession of by the defendant both the plaintiff and the defendant were liable to render accounts.

The cross-objections filed by the defendant were found to be without force, and it was held that the fact that although the share of the defendant in the capital was three-fourths and that of the plaintiff one-fourth, the profits and losses would in view of the provisions of section 13(b) of the Indian Partnership Act, be shared equally and not in the ratio of three-fourths and one-fourth. The defendant's claim that he was entitled to interest at 5 per cent per annum was also rejected.

Against the above appellate decree and judgment of the Senior Subordinate Judge the plaintiff has presented this appeal and the defendant has filed cross-objections.

Mr. Faqir Chand Mital, learned counsel who appeared on behalf of the plaintiff-appellant, has taken me through the several documents and has also read out the statement of the plaintiff Mansha Ram as P.W. 8, and his son Sat Parkash as P.W. 7, made before and after the framing of the additional issues. He has also read out to me the statement of the defendant in the witness-box appearing as D.W. 10. The principal contention of Mr. Faqir Chand Mital is, that on the proved and admitted facts of this case, the provisions of section 37 of the Indian Partnership Act have no

applicability. Section 37 of the Indian Partnership Act runs as under:—

> "Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partners or his estate is entitled at the option of himself or his representatives to such share of the profit made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm:
>
> Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section."

The arguments of Mr. Faqir Chand Mital may be stated as under:—

(a) That section 37 is not applicable because no business of the firm was carried on by Mansha Ram but by Messrs. Mansa Ram

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and Sons, whose partners were his three sons, and he had no interest of any kind in that firm.

(b) That the business of Messrs Mansha Ram and Sons was never carried on with the property of the firm Mansha Ram-Tej-Bhan, and

(c) That after the firm had been dissolved on 7th April, 1953, it could not be said that the surviving partner was carrying on its business; the business had ceased.

For the reasons to be stated I do not think that there is any force in the contention of Mr. Faqir Chand Mital.

Mr. Faqir Chand Mital says that the point covered by section 37 of the Indian Partnership Act did not form part of the pleadings of the defendant and he relying upon *Saddik Mohammed Shah* v. *Mt. Saran and others* (1), argues that where a claim has never been made in the defence presented, no amount of evidence can be looked into upon a plea, which was never put forward. There is no quarrel with this proposition which is also found in the maxim *judicis est judicare secundum allegate et probata* (It is the duty of a Judge to decide according to the facts alleged and proved). But for this proposition to apply, there must be substratum of facts. The second para of the additional pleas of the defendant runs as under "that the defendant has come to know from a reliable source that the plaintiff has started depositing the amount realised from the various departments on account of business of the partnership in the name of Mansa Ram and Sons without the defendant's consent. That account shall be deemed to be the account of the partnership and may be considered as such". I cannot, therefore, hold that the

(1) A.I.R. 1930 Privy Council 57.

above plea disentitles the defendant from claiming the benefit of the opportunity underlying section 37 of the Indian Partnership Act, 1932, especially where it was covered by issues 6, 7 and 8. His next argument is that there was no agreement between the parties disentitling the plaintiff from supplying bajri to the Government independently of the partnership. I am aware that under section 54 of the Indian Partnership Act there has to be a specific provision in a partnership agreement restraining a partner from carrying on a business similar to that of the firm. But to my mind the provisions of section 54 have no applicability to this case. Section 37 does not come into conflict with the provisions of section 54, which is entirely separate. It is not the defendant's case that Mansha Ram could not carry on similar business independently, if he desired to do so. His complaint against Mansha Ram is that he carried on the business of the firm with the property of the firm without there having been any final settlement of accounts. He had no right to utilise the assets of the firm for his own advantage as he is alleged to have done.

Again, there is no force in the argument of Mr. Faqir Chand Mital to the effect that as the firm stood dissolved on 7th April, 1953, no business carried on subsequently by the plaintiff, in the circumstances stated above, could be hit by the provisions of section 37 of the Act. Section 37 is intended to meet such circumstances as have been alleged by the defendant in this case. After the ceasing of the partnership business and before the settlement of final accounts it is not open to a surviving partner to utilise the assets of the partnership to his exclusive advantage.

Mr. Faqir Chand Mital then addressed arguments contending that on the record of this case, there was no proof of utilization of the assets of the firm by his client, Mansha Ram plaintiff. This contention cannot

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be substantiated from the record of this case. Mr. Daulat Ram Manchanda, learned counsel for the defendant-respondent, has drawn my attention to certain facts and circumstances which go to disprove the contention of Mr. Faqir Chand Mital. It is admitted by both the parties that two sums of Rs. 15,501-8-0 and Rs. 9,500-13-0 belonging to the partnership were drawn by the plaintiff on 7th March, 1953 and 1st April, 1953, respectively and got them deposited in his account with the National Bank of Lahore Ltd., Dehra Dun, in the name of Messrs Mansa Ram and Sons. Mr. Faqir Chand Mital says, that as the various accounts of the partnership were freezed, at the instance of the defendant, this amount could not be deposited in the firm's account It is true that the defendant wrote letters to the banks not to allow the plaintiff to operate upon those accounts, but he did not prevent them from receiving deposits of sums belonging to the partnership. Even if the plaintiff felt that he ought to have retained this amount of about Rs. 25,000 for meeting the liability of the firm, which now stood dissolved owing to dissensions between the two parties, he had no right to utilize this amount for the benefit of himself or his sons. Mansha Ram has not chosen to produce the pass book relating to this account in the bank at Dehra Dun. No proof has been led to show that Rs. 25,000 was lying intact or it has been used exclusively in meeting claims against the partnership. On the other hand it is also significant that the partnership started by the three sons of Mansha Ram in the name and style of Mansa Ram and Sons had not provided for any capital. The deed of partnership, Exhibit P. 10, to which a reference has already been made, did not mention the contribution of the respective partners, if any, but on the other hand, it was stated therein that the capital would be raised by loans. P.W. 7, Sat Parkash, one of the sons of Mansha Ram, has stated that a sum of Rs. 10,000 had been borrowed from his

mother-in-law and another sum of Rs. 15,000 had been taken on loan from one Lakhmi Das. Beyond his *ipse dixit* no evidence has been led in support of this contention of his. It is abundantly clear to me that Mansa Ram and Sons was a partnership of the three sons, only on paper, and this was a dodge resorted to by Mansha Ram, for his exclusive benefit, with the intention of depriving the defendant from enjoying the profits of the partnership or at least for preventing him from receiving back his contribution along with his share of profits. A business of the nature in which the parties were engaged could not be carried on without funds. Apart from the fact that there was no provision made for procuring capital in the partnership deed Exhibit P. 10, it had not been established that any sums were advanced either by the mother-in-law or by Lakhmi Das. One significant fact is that Mansha Ram had drawn two sums amounting to a little over Rs. 25,000 and had them deposited in the account of Mansa Ram and Sons in Dehra Dun branch of the National Bank of Lahore, Limited. According to Mansha Ram this was his personal account. This leaves no doubt in my mind that this amount which belonged to the partnership of firm Mansha Ram-Tej Bhan, was utilised for the benefit of the business, which was being conducted by Mansha Ram in the name of Mansa Ram and Sons. Mr. Faqir Chand Mital contended that it was for the defendant to prove that any sum out of this amount of Rs. 25,000 had in fact been utilised for the benefit of Mansa Ram and Sons. In view of the provisions of section 106 of the Indian Evidence Act the special knowledge, as to the manner in which this sum of Rs. 25,000 had been expended, was with Mansha Ram. Nothing was easier for Mansha Ram than to produce a statement of this account from the date when he deposited the sum of Rs. 25,000 and to show that this sum was left in tact or had been expended for meeting the

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liabilties of firm Mansha Ram-Tej Bhan, and that no part of it was utilised for purposes of carrying on his personal business, in the name of Mansa Ram and Sons, in bajri. There is no evidence led by Mansha Ram to show as to the manner in which this amount, which admittedly belonged to the parties, was utilized by him. In the notice P. 1, dated 4th February, 1954, addressed to the defendant by Mansha Ram's counsel it was made clear that Mansha Ram was continuing the supplies to the department and would continue to do so unless legal difficulties arose. Towards the concluding portion of this notice it was also stated, that Mansha Ram had opened an account in his own name, so that the defendant might not in future create any obstruction in the working of the partnership.

On 7th April, 1953, plaintiff's counsel wrote to the defendant's lawyer that the partnership would stand dissolved with effect from 7th of April, 1953, the date of Exhibit P. 4. The position taken throughout by the defendant was that the plaintiff was only seeking an opportunity to squeeze him out of the partnership. By Exhibit P. 4, notice sent on behalf of the defendant on 9th April, 1953, the plaintiff was called upon to execute a proper deed of partnership, on terms and conditions mutually agreed upon as mentioned in detail in his previous notice, dated 14th March, 1953, Exhibit P. 3, subject to the condition of incorporating the terms of partnership in a proper deed. The defendant has throughout been expressing his willingness to work in partnership. The anxiety to get rid of the defendant, and to dissolve the partnership, appears to have been manifested exclusively from the side of the plaintiff after, of course, a sum of Rs. 13,000 had been contributed by the defendant towards the partnership account. Even in the written statement the stand taken by the defendant was that the partnership was continuing and had not been dissolved. The above contention of the defendant will be borne out from the statement, dated

12th October, 1953, Exhibit D. 4, of Sat Parkash, son of Mansha Ram, made by him before the Collector while furnishing an explanation to an enquiry that was being made. In this statement he clearly averred that bajri had been supplied from the quarry taken on lease from Shrimati Radhika Rani. This quarry had admittedly been taken on lease by the firm Mansha Ram-Tej Bhan. Sat Parkash signed this statement on 12th of October, 1953, for Messrs. Mansha Ram-Tej Bhan. If on that date the partnership had been terminated, there was no point in signing that document on behalf of Messrs. Mansha Ram and Tej Bhan. Exhibit D. 13 is an agreement made between the President of the Republic of India and Messrs. Mansha Ram-Tej Bhan, permitting them the use of a piece of land at Chandigarh Railway Station for the purpose of stacking bajri on payment of Rs. 150 per annum. Sat Parkash signed this deed on 29th of September, 1953, "for Messrs. Mansha Ram-Tej Bhan". This act of his can only be explained on the assumption of the continued existence of the firm on that date, and is a factor which negatives the contention of the plaintiff that it was dissolved on 7th of April, 1953. Learned counsel for the respondent has contended with some force that it was really a case of expulsion of his client from the benefits of partnership, while the plaintiff continued to transact business in the name of partnership firm Mansha Ram-Tej Bhan. The learned counsel for the respondent also drew my attention to the statement of Sat Parkash, dated 31st December, 1954, wherein it was stated that it was a fact that firm Mansa Ram and Sons had been supplying bajri out of the quarry of Shrimati Radhika Rani, which had been taken on lease by firm Mansha Ram-Tej Bhan and never by firm Mansa Ram and Sons. It has not been shown by any convincing evidence that any royalty had been paid by Mansa Ram and Sons to Shrimati Radhika Rani. Mr. Daulat Ram, learned counsel for the respondent, has read to me extracts from the statement

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of D. W. 8, Jai Parkash, Assistant Inspector of Works Railway, Ambala, to the effect that Sat Parkash had paid the lease money due to the railway for the lease of the plot up to 19th of August, 1955, on behalf of the firm Mansha Ram-Tej Bhan. The evidence, which has been referred to above by me, makes it abundantly clear, as also found by the lower Court, that Mansha Ram has been carrying on the business of the firm Mansha Ram-Tej Bhan, with the property of the firm without any final settlement of accounts as between the parties long after his having given notice terminating partnership. In view of the facts and circumstances found above, the provisions of section 37 of the Indian Partnership Act apply, and the defendant Tej Bhan, is entitled to exercise his option, after the accounts have been rendered, and to claim such share of the profits made by Mansha Ram after 7th April, 1953, the date when notice dissolving partnership was given, as may be attributable to the use of Tej Bhan's share of the property of the firm, and in the alternative, to interest at the rate of six per cent per annum on the amount of his share in the firm's property. Tej Bhan, of course, is not bound to make his election, till the share of the profit, that would fall to him, has been ascertained, and hence his final election may be postponed, until the accounts have been taken. If at that time it transpires that only a portion of the assets were utilized, then that portion of the partnership assets would be taken into consideration for distribution of the profits. This is in accordance with the view held in *P. M. Ramakrishna Ayyar* v. *P. Muthusami Ayyar and others* (1), *Bhagwandas Mitharam* v. *Rivett-Carnac* (2). In *Ahmed Musaji Saleji and others* v. *Hashim Ebrahim Saleji and others* (3), Lord Sumner observed—

> "It is well settled that in certain cases, when on the dissolution of a firm, one of the partners

(1) A.I.R. 1929 Mad. 456=I.L.R. [52] Mad. 672.
(2) I.L.R. (1898) 23 Bomb. 544 (P.C.).
(3) A.I.R. 1915 P.C. 116.

retains assets of the firm in his hands without any settlement of accounts and applies them in continuing the business for his own benefit, he may be ordered to account for these assets with interest thereon, apart from fraud or misconduct in the nature of fraud."

Section 37 of the Indian Partnership Act is modelled upon section 42 of the English Partnership Act, 1890, which reads:—

42. (1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in

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all material respects comply with the term thereof, he is liable to account under the foregoing provisions of this section."

Tek Chand, J. The doctrine of attributable share was justified by Lord Lindley in his Treatise on the Law of Partnership, Eleventh Edition, page 707 upon the ground that the profits are accretions to the property which has yielded them, and ought to belong to the owner of such property, in accordance with the maxim *accessorium sequitur suum principale.*

Apart from this I may also refer to the provisions of section 88 of the Indian Trusts Act and to two illustrations (d) and (f) which are as under:—

> "Where a trustee, executor, partner, agent, director of a company, legal advisor or other person bound in fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."
>
> *Illustration* (*d*). "A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.
>
> *Illustration* (*f*). A and B are partners. A dies. B instead of winding up the affairs of the partnership retains all the assets in the business. B must account to A's legal representative for the profit arising from A's share of the capital."

Section 88 of the Indian Trusts Act enjoins upon the partner who remains in possession of the partnership assets *uberrima fides*, as regards the interests of the other partner. The former must account for the profits which have been accruing as a result of the working of partnership assets attributable to the share of the former partner. Strictly speaking, a partner is not a trustee of the other partner, but there is no denying the fact, that the partners stand in a fiduciary relation to one another and in such a case equity will never permit the surviving partner to trade, or to utilize the property of the other for his exclusive personal profit. If he makes a profit, it must be paid over to the owner of the property, the use of which produced the profit. Courts in England have always acted upon the above equitable principle. Sir William Grant, Master of the Rolls, while dealing with this matter in *Featherstonhaugh* v. *Fenwick* (1), enunciated this principle as under—

> "The next consideration is, whether the terms, upon which the defendants proposed to adjust the partnership concern, were those to which the plaintiff was bound to accede. The proposition was, that a value should be set on the partnership stock; and that they should take his proportion of it at that valuation; or that he should take away his share of the property from the premises. My opinion is clearly that these are not terms to which he was bound to accede. They had no more right to turn him out than he had to turn them out, upon those terms. Their rights were precisely equal to have the whole concern wound up by a sale, and a division of the produce. As, therefore, they never proposed to him any terms, which he was bound to accept, the consequence is, that

(1) (1810) 17 Ves. 298.

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continuing to trade with his stock, and at his risk, they came under a liability for whatever profits might be produced by that stock."

In *Stevenson (Hugh) and Sons, Ltd.*, v. *Aktiengesellschaft fur Cartonnagen Industried* (1), the facts were that an English Company and a German Company carried on a partnership in England until the outbreak of war in 1914 between Great Britain and Germany which operated as a dissolution of the partnership. After the outbreak of the war the English company continued to carry on the business and to use the partnership plant for that purpose. It was held, by the House of Lords, that the German Company was entitled to a share of the profits made after the dissolution, by carrying on the business, by the English Company with the aid of the German Company's share of the capital. The above principles have been subscribed to by the High Courts in India and reference may be made to *Kasi* alias *Alagappa Chettiar and two others* v. *RM. A. RM.* v. *Ramanathan Chettiar and another* (2), where the case law has been reviewed. See also *Ramnarayan and others* v. *Kashinath Jagnarain and another* (3). In *Turner* v. *Major* (4), where two partners had agreed to dissolve the partnership and had decided that the partnership premises, stock and goodwill should be sold, and, until sold, should vest in receivers, the Court not only restrained one partner, who had made use of the partnership property, from carrying on the business on his own account but further directed him to account for the profits made by him. The following

(1) (1915) A.C. 239

(2) I.L.R. 1949 Mad. 877

(3) A.I.R. 1954 Pat. 53

(4) 3 Giff. 442-66 E.R. 483.

passage from Lewin on Trusts, Fifteenth Edition, page 203, may be cited with advantage:—

> "Partners also stand in a fiduciary relation to each other and if on the termination of the partnership..... a partner, instead of winding up the partnership affairs, retains the whole assets in the trade, so that in effect the partnership continues, he must account for a share of profits. As profits arise not only from the capital, but also from the application of skill and industry, and other ingredients while in former times the Court, from the difficulty of taking the account, often gave interest only, yet, at the present day, the Court will direct an account of profits, having regard to the various ingredients of capital, skill, industry, etc., or will comprise them under the head of just allowances."

Having regard to the facts of this case, and the view that I take of the duty cast upon Mansha Ram there seems to be no escape for him except to account for the profits which he has been realising by utilisation of the partnership assets which include the entire investment of Tej Bhan. Agreeing with the conclusions of the lower Courts I dismiss the plaintiff's appeal with costs.

Defendant Tej Bhan had filed cross-objections before the lower appellate Court which were dismissed. He has again filed cross-objections in this Court. The lower Court, applying section 13(b) of the Indian Partnership Act, have found that no contract has been proved according to which the share of the two partners in the profits and losses of their business was in proportion to their investment towards the capital

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of the concern. They have, therefore, held that the partner's share in the profits earned and the losses sustained would be equal. It has been argued by the learned counsel for Tej Bhan that the contribution of his client in the capital of the concern was a little over three times that of the plaintiff and this ratio has been maintained from the very inception of the partnership till the end. Under these circumstances he wants me to deduce that the agreement between them was that the share in the profits and losses should be in proportion to their respective contributions in the capital. He says that according to the plaintiff Mansha Ram the reason for claiming half share in the profits was that Tej Bhan being invalid could not personally work which contention has been found to be without foundation by the two Courts. Under the circumstances, Mr. Manchanda argues that the only reason given for sharing the profits equally having been found to be baseless the claim of the plaintiff should be rejected. He has also drawn my attention to Exhibit D. 1, which is the ledger where it is clearly stated that the contribution of the defendant was twelve annas and that of the plaintiff was four annas in a rupee. This entry on Exhibit D. 1 is in the handwriting of Tej Bhan defendant. Learned counsel for the plaintiff urges that this was an entry made subsequently by Tej Bhan after he had taken possession of the books on 27th February, 1953. There is nothing on the record from which I may conclude that the entry Exhibit D. 1 was subsequently made. Assuming that the entry had been there from the very inception I do not see how it helps the defendant in showing that the agreement between the partners was to share profits and losses in the ratio of twelve annas and four annas. The entry relates to capital contribution without referring to profits and losses. The provisions of section 13(b) of the Indian Partnership Act are analogous to section 34(1) of the English Partnership Act, 1890. It is stated by Lord Lindley in his Treatise on the Law of Partner-

ship, Eleventh Edition, page 435, that "it is not unreasonable to infer, in the absence of evidence to the contrary that the partners have agreed to consider their contributions as of equal value, although they may have brought in unequal sums of money, or be themselves unequals as regards skill, connection, or character. Whether, therefore, partners have contributed money equally or unequally, whether they are or are not on a par as regards skill, connection, or character, whether they have or have not laboured equally for the benefit of the firm, their shares will be considered as equal, unless some agreement to the contrary can be shown to have been entered into." In *Robinson* v. *Anderson* (1), two solicitors were jointly retained to defend certain actions and there was no satisfactory evidence to show in what proportion they were to divide their remuneration. It was held that they were entitled to share it equally although they had been paid separately and had done unequal amounts of work. The Master of the Rolls enuniciating the above principle observed:—

> "Assuming nothing to have been said as to the manner in which the profits were to be divided, it appears to me to follow as a necessary consequence of law that they are to be divided equally between them. And, although one may do more business and have exerted himself more than the other, yet if nothing is said upon the subject of profits, the presumption is that they are to be equally divided between them. It appears to me, that if the clients had gone to Mr. Robinson and Mr. Anderson, and said.—We wish you to undertake the business for us, and thereupon Mr. Robinson and Mr. Anderson had both said—We agree to do so, and nothing had taken place

(1) 20 Beav 98.

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between them as to the manner in which they were to be paid, the necessary consequence would have been that after payment of the costs out of pocket, the net profits made by the business would have been divisible equally between them, and that neither of them could say to the other:—I have done more business than you have, and am, therefore, entitled to a larger share of profits. It was the duty of the party who intended that this should not be a partnership transaction, and that he should be paid for the amount of business which he did without participating in that of the other, so to express himself."

In the absence of any proof as to the respective shares of the parties in profits and losses I have no alternative but to hold that their shares shall be equal. The cross objections of the defendant are, therefore, dismissed.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Chopra J.

S. BAKHSHISH SINGH AND OTHERS,—*Appellants*

versus

HAZARA SINGH AND OTHERS,—*Respondents*

Letters Patent Appeal No. 113 of 1955.

1957

Feb. 19th

Administration of Evacuee Property Act (XXXI of 1950)—Sections 12 and 26—Administration of Evacuee Property (Central) Rules, 1950—Rule 14—Order of re-allotment of all the lands in village—Whether amounts to cancellation of allotment—Notice to allottees—Whether necessary—Section 26—Scope of—Whether applicable to original orders of cancellation of allotment—Constitution of India—Article 226—Powers of High Court—When to be exercised—Principles of natural justice—Affording of opportunity to be heard—Meaning and extent of.