

**(1923) 07 CAL CK 0060**  
**In the Calcutta High Court**

Rughumull Khandelwal

APPELLANT

Vs

The Official Assignee of Calcutta and Others

RESPONDENT

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**Date of Decision :** 12-07-1923

**Acts Referred:**

Contract Act, 1872 — Section 239

**Citation :** AIR 1924 Cal 424

**Hon'ble Judges :** Sanderson, C.J;Mookerjee, J;Chatterjea, J

**Bench :** Full Bench

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## Judgement

Sanderson, C.J.—This is an appeal by the plaintiff in the suit, one Raghumull Khandelwal, and the respondent is the Official Assignee representing the estate of one Dorain Evans, who was the first defendant in the suit.

2. The suit was brought against Dorian Evans, Hari Charan Ghosh and Dino Nath Sircar on the allegation that there was a partnership between the plaintiff and the defendants : and the prayers were for a declaration of the shares of the parties in the partnership and for a declaration that the partnership stood dissolved on the 21st of December, 1920, and for incidental reliefs.

3. The sole question which we have to consider is whether Dorian Evans was a member of the partnership, which admittedly existed between the plaintiff and the other two defendants and, the question depends upon the construction of the agreement, dated the 15th June, 1919.

4. My learned brother Mr. Justice Greaves who tried this suit came to the conclusion that Dorian Evans was a partner in the firm.

5. There was an appeal by Dorian Evans to the appeal Court, and the appeal was heard by my learned brothers Mr. Justice Woodroffe and Mr. Justice Richardson. These two learned Judges differed in their opinion, Mr. Justice Woodroffe holding that Dorian Evans was not a partner and Mr. Justice Richardson holding that he was a partner. The result was that the opinion of Mr. Justice Woodroffe prevailed and the appeal was allowed.

6. This appeal is under the Letters Patent against the decision of Mr. Justice Woodroffe.

7. The terms of the agreement have been so fully dealt with in the judgments of both the learned Judges, who heard the appeal, that I do not think it necessary to go through the clauses in detail. It is sufficient for me to say that but for Clauses 5 and 6 of the agreement, in my opinion, there could not be the smallest doubt that Dorian Evans was a partner of the firm in question.

8. The section of the Contract Act which applies to the matter is Section 239 which runs as follows : "Partnership is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them." That is the definition of partnership within the meaning of the Contract Act: and, I desire to emphasize in this case, that which I have said on previous occasions, viz., that the principle which was laid down by Lord Herschell in the case of *Vagliano Brothers v. The Governor and Co. of the Bank of England* (1891) A.C. 107 should be observed when the Court has to consider the interpretation which ought to be put upon a section such as that now under consideration. The learned Lord said as follows : "I think the proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated." It is on account of the principle, which was thus laid down, that I do not refer to the English cases, which were cited to us during the argument, and I decide this case having regard to the language of Section 239 of the Contract Act.

9. It is not disputed that the proper test is to try and to find out from the agreement, reading it as a whole what was the real intention and contract of the parties. Applying that test and having regard to the natural meaning of the language used in Section 239, I have no doubt that the intention of the parties to the agreement was that Mr. Evans should be a partner.

10. Mr. Justice Woodroffe based his decision on the sole ground that in this case there was no agreement that Dorian Evans should share the profits of the business : and I proceed to deal with that point.

11. Clause 5 provides that "the said Mr. Dorian Evans will be in charge of the firm and devote his whole time in the business of the firm and will get Rs. 500 per month as his remuneration over and above 10 per cent, as commission on the net profit of the business exclusive of all the cost, expense for payment of rent, taxes, municipal license, salaries of servants and al] other charges and expenses

to be incurred in carrying on partnership business but he will get no shares of profit of the firm."

12. Clause 6 provides that "Babu Lala Raghumull will get 12 annas share and H.C. Ghosh will get 2 annas 6 pies share and Babu D. N. Sircar will get 1 anna 6 pies share in the profits of the said business," making altogether the 16 annas.

13. I agree with my learned brother Mr. Justice Richardson's conclusion in respect of this part of the contract. The learned Judge said : "It is said that Clause 5 of the agreement expressly states that the Appellant "will get no shares of profit of the firm." In my opinion that can only mean in the context that he is to get no share other than the share already provided for, namely, a salary of Rs. 500 a month and a commission of 10 per cent, on the net profits." I agree, with respect to my learned brother, with that conclusion except that I should substitute the word "remuneration" for "salary." The learned Judge then proceeded as follows : "That first sentence of Clause 19 supports this construction. If the appellant was not a partner but a mere servant or managing agent, what was the necessity of providing that if the firm should suffer loss he should still get his monthly remuneration regularly."

14. In my judgment, it is clear that the 10 per cent, was to be paid to Dorian Evans out of the net profits of the business when they were ascertained, and although the words "as commission" are used in the agreement, the 10 per cent, which was to be received by Mr. Dorian Evans was a share of profits within the meaning of Section 239 of the Contract Act.

15. The conclusion, therefore, at which I arrive, is that Dorian Evans by the terms of the agreement had a share in the profits and that reading the agreement as a whole, there is overwhelming evidence that the intention of the parties was that Dorian Evans as well as the other three persons should be partners of the firm.

16. For these reasons I agree with, the conclusion at which my learned brother Mr. Justice Richardson arrived, and, in my opinion, this appeal should be allowed.

17. The appellant Raghumull Khandelwal is entitled to his costs in the appeal before Mr. Justice Woodroffe and Mr. Justice Richardson and also in the appeal before this Court.

18. It was pointed, out by Mr. Justice Woodroffe that the form of the decree WAS admittedly defective, consequently the decree will be amended in accordance with the suggestion made by Mr. H.D. Bose, the learned Counsel for the Official Assignee as follows:

It is declared that the defendant A.H.C. Dorian Evans is a partner of the firm of Dorian Evans & Company in the plaint in this suit mentioned and is entitled to a remuneration of Rs. 500 a month and also a commission of 10 per cent, on the net profit of the business as mentioned in Clause 5 of the Memorandum of Partnership, dated the 15th of June, 1919, and. it is further declared that the

plaintiff is entitled to twelve annas part or share of the profits of the partnership in the plaint in the suit mentioned and the defendant Hari Charon Ghosh is entitled to two and a half anna share therein and. that the defendant Dino Nath Sircar is entitled, to one and a half anna share thereof, and aro liable for loss in such shares as mentioned in Clauses 6 and 19 of the said plaint.

19. Subject to the above modification the decree of the Court of first instance is restored,

Mookerjee, J.

20. I agree that the view taken by Mr. Justice Richardson must be upheld. I would not have thought it necessary to make any observation but for the fact that there Has been a difference of opinion between Mr. Justice Woodroffe and Mr. Justice Richardson.

21. It is conceded that the relative rights of the parties must be determined upon a true construction of what is described as the memorandum of co-partnership agreement made on the 15th of June, 1919, among four persons Raghumull, Dorian Evans, H.C. Ghosh and D.N. Sircar. The true rule of construction is not to take one term of the contract and raise a presumption therefrom, but to ascertain the whole scope of the agreement by reference to all its terms. If this process be adopted it is plain that there is no answer to the appeal, The introductory paragraph makes it abundantly clear that the memorandum was a partnership agreement amongst the four persons and that these persons desired to start partnership business. The firm itself was named after Evans and the next paragraph stated that the place or places of business wore to be determined by agreement of the co-partners, i.e., the four persons who had entered into the partnership agreement. the second paragraph entitled the financing partner to get interest not from three of the four persons but from the firm. It is not necessary to examine in detail all the provisions of this agreement but I may refer to para. 19 and para. 23, Para. 19 leaves no doubt that Evans was a partner and that he was entitled to get his monthly remuneration regularly while the other partners would be liable for loss according to their shares. Then follows the sentence "Each partner shall be just and faithful to the capitalist partner." This I have no doubt refers to all the three partners other than the capitalist partner. Para. 23 placed Evans and Ghosh on the same footing in respect of certain matters, namely, if either of them committed a breach of the provisions of the memorandum or committed an act of bankruptcy or should become physically unfit to attend to the business or committed a criminal offence or did or suffered an act which would be a ground for dissolution of the partnership by the Court, then the capitalist partner might by notice in writing determine the partnership which according to a previous Clause was to continue for a fixed term of five years. To my mind it is inconceivable that if Evans had been a mere Manager, the partners should have ever contemplated that this result would follow merely because he became physically unfit to attend to the business or committed an act of bankruptcy.

22. The deed taken as a whole leaves no doubt as to the position of Evans, but it is urged that the provisions of the 5th and 6th paragraphs nullify the effect of the other clauses. In this connection an attempt was made to refer to a decision which had no bearing upon the construction of Section 239 of the Indian Contract Act; this codifies the law on the subject in this country, and I agree entirely with the observations made by the learned Chief Justice as to the danger likely to result if provisions of this character were attempted to be interpreted by reference to judicial decisions which, it is well known, cannot be reconciled. Section 239 requires that the persons should have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them. The argument on behalf of the respondent was that the legislature intended to provide that the parties should have agreed to share in the profits "as such" between them. This is precisely what the legislature has not said. Clause 5 provides for the payment of Rs. 500 as remuneration to Evans and also 10 per cent. of the net profits of the business as commission. It is urged that as the 10 per cent. of the profits was to be paid as commission, this was not a share in the profits within the meaning of section 239. I do not think this contention is well founded. The expression "share of the profits" is simple and a narrow construction ought not to be put on it.

23. Taking the document as a whole I have no doubt that the view taken by Mr. Justice Richardson is correct.

Chatterjea, J.

24. The question whether Dorian Evans was or was not a partner depends upon the construction of the memorandum of agreement, and there can be no doubt, having regard to the terms of the document except Clauses 5 and 6, that it was intended that Dorian Evans was to be a partner just as the others.

25. The only question to be considered, to my mind, is Whether having regard to the terms of Clauses 5 and 6, there was an agreement to share the profits of the business between Dorian Evans and the other partners in other words, whether the payment of 10 per cent, commission of the net profits of the business was a share of the profits of the business. The expression "a share of the profits" is not defined in the section, and I think there is no sufficient reason for holding that payment of 10 per cent, on the net profits is not a share of the profits. The question whether there was a partnership or not must depend on the real intention and contract of the parties and, having regard to the agreement of the parties, taken as a whole, I am of opinion that Dorian Evans was a partner.