

Haramohan Poddar and anr. Vs. Sudarsan Poddar and ors.

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Court : Kolkata

Decided On : Mar-19-1920

Reported in : AIR1921Cal538,66Ind.Cas.811

Judge : Asutosh Mookerjee and ;Walmsley, JJ.

Appellant : Haramohan Poddar and anr.

Respondent : Sudarsan Poddar and ors.

Judgement :

1. The suit, which has given rise to this appeal, was brought by the plaintiff-respondent for dissolution of a partnership, for winding up its business, for taking the accounts and for incidental reliefs. The case for the plaintiff is that there were two sets of partners, styled respectively capitalist partners and Gomasta partners. The first class included the plaintiff, the first defendant and the fathers of the second and third defendants, who were to provide the capital, receive a share of the profits and bear the losses in stated proportions. The second class included the remaining six defendants who were to receive specified shares of the profits as remuneration for their labour, but had no concern with the losses. The business was carried on in rice, jute and other articles and also included money lending. The firm was started in 1851 A.D.; and the first defendant has ever since acted as the managing partner. According to the plaintiff, the business has not been properly managed for some time past and in its present condition, can no longer be carried on profitably. He accordingly prays that the partnership may be dissolved, the

business wound up and the accounts adjusted. The defendants have resisted the claim on a variety of grounds which need not be enumerated in detail for our present purpose; it is efficient to state that they have sought to defeat the action on the plea of limitation ; their allegation in substance is that the partnership was, in fact and in law, dissolved long before the institution of the suit. The Subordinate Judge has overruled the contentions of the defendants and has made a preliminary decree. That decree has been assailed before us on grounds which may be formulated under three heads, namely, first, that the suit is barred by limitation; secondly, that no personal liability can be imposed upon the infant representatives of one of the original partners and thirdly, that no decree should have been made at this stage in favour of the plaintiff, entitling him to recover the capital supplied by him.

2. As regards the first point, the second and third defendants, who are the appellants before this Court, have contended that the suit is barred under Article 106 of the Schedule to the Indian Limitation Act. That Article provides that a suit for an account and a share of the profits of a dissolved partnership must be instituted within three years from the date of the dissolution. It is plain that the section applies only to a dissolved partnership. The reason is obvious: it is an elementary principle that limitation cannot apply as between partners so long as the partnership continues. [Foster v. Hodgson (1812) 10 Ves. 180 at 183 : 34 E. R. 485.]; it is different after there has been a termination of the partnership or discontinuance of it [Noyes v. Crawley (1878) 10 Ch. D. 31 : 48 L. J. Ch. 112 : 39 L. T. 267 : 27 W. R. 109. Knox v. Gye (1872) 5 H. L. 656 at p. 674 : 42 L. J. Ch 234.]. The defendants have consequently argued that the partnership was dissolved before the commencement of the suit. This contention has been based on a three-fold ground. It has been contended, in the first place, that under Clause (1821) 5 B. & Ald. 147 at p. 157 : 24 R. R. 307 at p. 314 : 106 E. R. 1147, of Section 253 of the Indian Contract Act, the partnership was dissolved by the death of one of the original partners, namely, the father of the second and third defendants, in February or March, 1909; in this view, the present suit, instituted on the 8th September 1913, would be barred by limitation under Article 105. In our opinion, this contention is not well-founded. No doubt, Clause (1821) 5 B. & Ald. 147 at p. 157 : 24 R. R. 307 at p. 314 : 106 E. R. 1147, of Section 203 provides

that a partnership, whether entered into for a fixed term or not, is dissolved by the death of any partner. But this rule is subject to the important qualification embodied in the opening words of the section, namely, in the absents of any contract to the contrary.' Partners may accordingly agree that on the death of any of them, his nominee or legal representative shall be entitled to take his place. Whether in a particular case there has or has not been such an agreement, may be proved by an express declaration to that effect or may be determined from the conduct of the parties. This is clear from the decision in *Gokul Krishna Das v. Shashi Mukhi Dasi* 13 Ind. Cas. 23 : 16 C. W. N. 299 : 16 C. L. J. 204, which was applied in *Raghumull v. Luchmondas* 38 Ind. Cas. 278 : 20 C. W. N. 708., the judgment of the latter case has subsequently been affirmed by the Judicial Committee. Now, in the case before us, it has been found by the Subordinate Judge that, on the death of the father of the second and third defendants, I the latter stepped into his place, they were accepted by the other members, without question, as partners in a continuing firm and in that character contributed capital and withdrew sums of money from time to time. The second defendant, indeed, admitted on the 17th March 1916 in the course of his deposition in another suit, that on his father's death he and his brother became maliks of the firm. In these circumstances, it is now impossible for them to maintain, even with a show of plausibility, that the partnership was dissolved on the death of their father. It has been contended in the second place that the partnership was dissolved so far back as 1906 by the retirement of one of the Gomasta partners, and reliance has been placed upon *Clause 25 M. 143 at p. 164 : 11 M. L. J. 353*, of *Section 853* which provides that, if from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members. This, as in the case of *Clause (1821) 5 B. & Ald. 147 at p. 157 : 24 R. R. 307 at p. 314 : 106 E. R. 1147*, is subject to any agreement to the contrary, which may be established by proof of express declaration or may be inferred from conduct. Now, there can be no doubt that notwithstanding the retirement of Gomasta?, the partnership in this case has been carried on as a continuing firm. This is obviously natural; the Gomastas were no doubt called partners, but they were essentially officers of the firm. They were paid, not a fixed salary, but a share of the profits by way of remuneration; the manifest object was to stimulate their industry and it is

significant that they had no concern with the losses. It would be clearly reasonable to hold that the parties never intended that the retirement of one or other of persons in such position should lead to the dissolution of the partnership. In the third place, the contention has been put forward that the partnership was dissolved, as the business was stopped and the partners refused to advance further sums on the capital account. There is plainly no force in this contention. Neither stoppage of business nor refusal of a partner to make further advances can be treated as dissolution of the firm. The Subordinate Judge has found upon the evidence---and his finding has not been successfully displaced that the business of the firm, in some of the departments at least, was earned on to a date only a few months prior to the institution of the suit. The business of the firm included money-lending, and regular arrangements were undoubtedly in existence for the collection of the dues in 1912, if not in 1913. It is further plain that refusal by a partner to supply capital whenever the demand is made on him is not conclusive proof of his intention to retire within the meaning of Clause 26 Ind. Cas. 836 : 42 C. 225, of Section 253. The question, whether there has been abandonment by a partner is a matter of inference to be drawn from the facts of each case. *Moung The Ruyin v. Mah Thein Myah* 27 I. A. 189 : 28 C. 53 : 5 C. W. N. 114 : 7 Sar. P. C. J. 776 (P. C.). *Sudarsanam Maistri v. Narasimhulu Maistri* 25 M. 143 at p. 164 : 11 M. L. J. 353. In the present case, we can find no indication of an intention to retire or abandon on the part of any of the partners. We hold accordingly that the partnership was not dissolved before the institution of the suit which is consequently not barred under Article 106. If Article 120 is held applicable, the suit is plainly not barred, as the right to sue for dissolution of a continuing partnership exists so long as the partnership continues. The first ground urged in support of the appeal cannot consequently be maintained.

3. As regards the second point, it has been urged that no personal liability can be imposed upon the infant representatives of Janaki Nath Poddar, one of the original partners. This contention is clearly well-founded. Section 217 of the Indian Contract Act provides that a person who is under the age of majority according to the law to which he is subject may be admitted to the benefits of a partnership, but can-not be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm, is liable for the obligations of the firm.

Consequently, the right of the minor to claim a certain proportion of the divisible income and ultimately to re-claim a certain proportion of capital at the proper times, if and whenever it is found that there is profit to divide and surplus assets to distribute, may be made available for the benefit of the creditors of the firm. But the position is incontrovertible that the infant, who is admitted to the benefits of the partnership, cannot be made personally liable for any obligation of the firm. *Sanyasi Charan Mandal v. Asutosh Ghosh* 26 Ind. Cas. 836 : 42 C. 225. *Khetra Mohan Poddar v. Aswini Kumar Saha* 45 Ind. Cas. 667 : 22 C. W. N. 438. It is not necessary at the present stage to consider the effect of Section 243 which defines the liability of a minor partner on, attainment of majority, unless he gives public notice of his repudiation of the partnership. This provision seems to place the creditors of the firm in a more favourable position than in England, *Goode v. Harrison* (1821) 5 B. & Ald. 147 at p. 157 : 24 R. R. 307 at p. 314 : 106 E. R. 1147. In the present case, at the time of the death of Janaki Nath Poddar, both his sons were infants; one of these, Hara Mohan, attained majority subsequently and the other, Bhuban Mohan, was a minor at the date of the institution of the suit. It is plain that the liability of these appellants has to be considered in three stages. As regards the personal liability of Janaki Nath Poddar at the time of his death, the appellants, as his sons, can be made liable only to the extent of the assets inherited by them, As regards liability for the transactions of the firm since the death of Janaki Nath Poddar, the appellants are not personally liable up to the date of attainment of majority of the elder brother, Hara Mohan Poddar. For transactions since that date, Hara Mohan would be personally liable, but his brother Bhuban Mohan would not be so liable, as he continued to be a minor. These distinctions must be borne in mind when the accounts are taken. The second ground must consequently prevail.

4. As regards the third point, it has been argued that no decree should have been made in favour of the plaintiff so as to entitle him to recover the capital contributed, even before the accounts are taken. There is no force in this contention in the special circumstances of this case. The Subordinate Judge has found that the first defendant has withdrawn the capital in respect of his share and the share of the father of the second and third defendants. The Subordinate Judge has further stated that as soon as difficulties arose in conducting the business of the firm, the

first defendant, who was the managing partner, 'acted treacherously towards the plaintiff and left him to his fate.' In these circumstances, it is only just that the plaintiff should be placed in the same position as the other capitalist partners. In addition to this, the amount advanced by the plaintiff has already been investigated and determined, and no serious endeavour has been made to convince us that the amount has been erroneously calculated; it would thus be an idle formality to leave the matter open for fruitless discussion. The third ground must consequently be overruled as wholly unsubstantial.

5. We may add that in the course of argument, an objection was taken to the order for the production of account books, but we were satisfied that the direction given by the Subordinate Judge was not open to criticism. All account books must be produced by the parties who have possession of or control over them. If a party disobeys the order made in this behalf,' the Court has ample power to enforce its order. We were also invited to consider the effect of the alleged misappropriation by the Gomasta partners; but this is a question which cannot be usefully discussed till the accounts have been taken and the facts ascertained. It was also suggested that the plaintiff can ultimately obtain a decree, only according to his share, and that the share of the first defendant should be treated separately from that of the appellants. These prayers are reasonable and may be borne in mind when the final decree is drawn up.

6. The result is that this appeal is allowed only in part and the decree modified by the addition of the declaration of the liability of the appellants as stated above, As the appeal has failed to a large extent, the appellants will pay the plaintiff-respondent the costs in this Court, but the hearing fee will be assessed at three-fourths of the prescribed amount.