1940

EMPEROR v. RAMJI VALA

Beaumont J. C.

thought that there were two wounds. But I think the view of the Civil Surgeon, who made a more exhaustive examination, though twent-four hours after the offence, is to be preferred. A wound of that nature might very easily have caused the death of the complainant. He was kept in the Civil Hospital for treatment for three weeks.

We think that three years' rigorous imprisonment is too light a sentence, and we therefore enhance the sentence to five years' rigorous imprisonment.

SEN J. I agree.

Sentence enhanced.

Y. V. D.

PRIVY COUNCIL.

J. C. *
1940
January 25

BASANGOUDA SIDANGOUDA PATIL, PETITIONER *v.* YELLAPPAGOUDA SHANKARGOUDA PATIL, RESPONDENT.

[From the High Court of Judicature at Bombay]

Privy Council—Practice—Special leave to appeal in forma pauperis—*Minor—Next friend possessed of sufficient property to deposit security for costs.*

On the petition of a minor by his next friend for special leave to appeal *in forma pauperis* to His Majesty in Council in a case in which the High Court had, on appeal to it, differed from the Subordinate Judge and granted leave to appeal to His Majesty in Council in the ordinary form, it was found after enquiry that the minor was a pauper and that the next friend was a proper person to act as such and was possessed of property of the value of Rs. 5,850 and that there was no other person willing to act as such.

Leave to appeal was granted, but on the ordinary terms as to deposit of security for costs.

P. V. Subba Row, for the petitioner.

J. M. Parikh, for the respondent.

Solicitor for the petitioner: Mr. *Harold Shephard*.

Solicitors for the respondents: Messrs. *Hy. S. L. Polak & Co.*

C. S. S.

* *Present:* Viscount Maugham, Lord Porter and Sir George Rankin.

APPELLATE CIVIL

Before Mr. Justice Kania.

VAZIRBHAI SULTANBHAI TAMBOLI (ORIGINAL PLAINTIFF), APPELLANT *v.* GADMAL NATHMAL MARWADI (ORIGINAL DEFENDANT), RESPONDENT.* 1940 *January* 31

Indian Limitation Act (IX of 1908), Sch. I, Art. 106—Partnership—Dissolution—Suit for accounts—Business of partnership stopped—No evidence of intention to terminate legal relation of partnership—Suit not barred by limitation—Legal inference from proved or admitted facts—Second appeal.

The plaintiff filed a suit for taking accounts of partnership business. In January 1933 the plaintiff gave a notice of demand for accounts. The suit was filed in December 1933. Both the lower Courts held that no business was done by the partnership shop after 1924; that only certain suits and execution applications were filed by the defendant for recovering amounts due to the shop. The suit was, therefore, held barred under Art. 106 of the Indian Limitation Act, 1908. On second appeal to the High Court, it was found that the proved or admitted facts were as follows: (1) that there was no fresh business done after October 1924; (2) that the shop which was rented by the partnership was closed and the lease surrendered to the landlord about the same time; (3) that the financial position of the firm was difficult and the plaintiff was disinclined to work and to attend to the business.

Held, that on these facts, the only legal inference that could be drawn was that although there was evidence indicating clearly that the business of the partnership had stopped in October 1924, there was no evidence of dissolution or intention on the part of either party to terminate the legal relation of partnership; that followed only when the plaintiff gave notice to render accounts in January 1933. The suit was, therefore, not barred under Art. 106 of the Indian Limitation Act, 1908.

Sathappa v. *Subrahmanyan*[1] and *Joopoody Sarayya* v. *Lakshmanaswamy*,[2] relied on.

Wali Mohammad v. *Mohammad Baksh*,[3] referred to.

SECOND APPEAL against the decision of I. C. Munsif, Assistant Judge at Nasik, confirming the decree passed by R. A. Karandikar, Subordinate Judge at Nasik.

Suit for partnership accounts.

The plaintiff alleged that in October 1913, four persons, Sultan (plaintiff's father), Shekh Janmahomed, Triumbak

*Second Appeal No. 310 of 1938.

(1) [1927] A. I. R. P. C. 70. (2) (1913) 36 Mad. 185.
(3) (1929) 32 Bom. L. R. 380, s. c. L. R. 57 I. A. 86, s. c. 11 Lah. 199, P. C.

1940

VAZIRBHAI SULTANBHAI v. GADMAL NATHMAL

and Gadmal (defendant) entered into a trading partnership for doing business in purchasing and selling cloth at Manmad; that Janmahomed left the partnership in 1921 and Triumbak in 1922; that plaintiff and defendant carried on business till October 1924 when the shop was closed altogether; that it was then orally agreed between the plaintiff and defendant that the latter should sell all the cloth and recover outstandings and after this was completed an account of the partnership was to be made and the profits were to be divided.

The defendant contended *inter alia* that the partnership was dissolved in the year 1924; that there was no oral agreement as alleged by the plaintiff; and that the suit was barred under Art. 106 of the Indian Limitation Act.

The Subordinate Judge held that the oral agreement set up in the plaint was proved. He, however, held that the suit was barred under Art. 106 of the Indian Limitation Act, 1908, as in his opinion the dissolution of the partnership business took place in the year 1924. He relied on *Amirchand* v. *Jawaharmal*, 32 I. C. 853, and gave reasons as follows:—

"What seems to have happened in the present case is that when parties decided to close the shop in 1924 and entrust the work of realising the assets to Defendant and make up the accounts after the assets were realised and the cloth in stock sold, the partnership became dissolved by mutual consent and all the subsequent acts, viz., the filing of suits and darkhasts were referrable to and in consonance with the oral agreement pleaded by Plaintiff. There was therefore no occasion nor any necessity for doing any of the acts mentioned in the passage above referred to. The citation, therefore, hardly, if at all, helps the Plaintiff's case. It was then argued on the authority of Lindley (page 483) that 'the realisation and division of profit is the ultimate object of every partnership met with in ordinary life.' In fact this principle is adopted in the very definition of the term 'partnership' in the Indian Contract Act (section 239) and the Indian Partnership Act (section 4). Realisation and division of profit is quite distinct from the realisation and division of assets, the differentiation being in the positive as against a negative existence of a partnership in each case respectively. In other words the former is done during the continuance of a partnership and the latter is done only after its dissolution. In 25 Mad. 149, at page 163, Mr. Bhashyam Ayyangar J. has stated, that the termination of a partnership 'is the same as a dissolution' and in the present case with the business of

the partnership terminating in 1924, there was its dissolution and it is on the basis of a dissolved partnership that the plaint in this suit and the notice, exhibit 62, seem to have been drafted. The suits and darkhasts filed after 1924 are in no way inconsistent with this dissolution inasmuch as there were attempts to realise the assets of the shop. I am clearly of opinion that the dissolution having taken place in 1924 this suit for accounts of a dissolved partnership in 1933 is barred owing to lapse of time prescribed under Art. 106 of the Indian Limitation Act."

On appeal the Assistant Judge held that the oral agreement as alleged by the plaintiff was not proved. He, therefore, following the decision in 32 I.C. 853 agreed with the opinion of the Subordinate Judge and confirmed the decree and dismissed the appeal.

The plaintiff appealed to the High Court.

M. P. Amin, with *V. N. Chhatrapati*, for the appellant.

Diwan Bahadur P. B. Shingne, with *J. G. Rele*, for the respondent.

KANIA J. This is a second appeal from the decision of the Assistant Judge at Nasik. The only point to be determined is whether the plaintiff's suit for taking accounts of the partnership business is barred by the law of limitation. Both the lower Courts have held the claim to be time-barred. In January 1933, before the plaint was filed, the plaintiff gave a notice of demand for accounts. According to the plaint that was because there was an agreement between the parties the terms whereof are recited in paragraph 2 of the plaint. The trial Court upheld the agreement but the lower appellate Court came to a contrary decision. In second appeal I cannot go into that question of fact which is based on oral evidence. The appellant's contention, if it rested on that agreement only must be rejected.

It is however urged on behalf of the appellant that the inference drawn by the lower Courts, from the fact that no business was done after 1924, that there was a dissolution of partnership is erroneous. As regards the powers of the

1940

VAZIRBHAI SULTANBHAI v. GADMAL NATHMAL

Kania J.

Court in second appeal, in *Wali Mohammad* v. *Mohammad Baksh*,[1] it is stated amongst other things as follows :—

"The legal inference to be drawn from proved or admitted facts is a matter of law, or, in other words, the proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact."

The question is when was the partnership between the plaintiff and the defendant dissolved. The Court has to find out whether the relations between the plaintiff and the defendant who had agreed to share the profits of the business carried on by them had come to an end. That is an inference which in this case is drawn from certain facts. In second appeal the question whether those facts were proved cannot be gone into. The proved or admitted facts are the following : (1) That there was no fresh business done after September/October 1924. (2) That the shop which was rented by the partnership was closed and surrendered to the landlord at about the same time. (3) That the financial position of the firm was difficult and the plaintiff was disinclined to work and attend to the business.

The question is whether from these facts it is legitimate to draw an inference that the relations between the parties came to an end. On a perusal of the judgments of the lower Courts it appears that the Courts have not kept in mind the distinction between the closing of a business and dissolution of a partnership. These two things have been mixed up with the result that in considering the legal effect of each fact shown to be proved the lower Courts in my opinion have not come to a correct conclusion. When a partnership at will is formed, apart from the circumstances in which the Court may dissolve it, it can come to an end by a notice of dissolution or abandonment by one of the partners of the partnership. In the present case the only inference which can be properly drawn from the facts established is that in about October 1924 the parties saw that further

[1] (1929) 32 Bom. L. R. 380, s. c. L. R. 57 I. A. 86, s. c. 11 Lah. 199, P. C.

business was not profitable. Two alternatives were then before them. If they had lost confidence in each other, for the winding up of the business, one would give notice to the other and come to the Court and ask the Court to intervene. If they had not lost confidence, the selling of the goods of the partnership could be done by both or either, and if left to either, that partner would be acting as the agent of the other. The fact that no further partnership business was done does not result in a dissolution of the partnership is made clear by the Judicial Committee of the Privy Council in *Sathappa* v. *Subrahmanyan*.[1] An inference to the same effect is clearly shown to be deducible from another judgment of the Judicial Committee of the Privy Council in *Joopoody Sarayya* v. *Lakshmanaswamy*.[2] In the present case the facts which are admitted and proved show that the defendant was left with the work of selling the goods, which had remained unsold, and he also attended to the recovery of outstandings. Indeed the defendant's action in filing the darkhast (exhibit 41) where he applied for payment of the sum, for which a decree was passed in favour of both the plaintiff and the defendant, shows that he affirmed till then his power to act as an agent on behalf of the partnership. The result therefore is that although there is evidence indicating clearly that the business of the partnership had stopped there is no evidence of dissolution or intention on the part of either party to terminate the legal relation of partnership. That result followed only when the plaintiff gave notice to render accounts in January, 1933, and thereafter he filed this suit for an account of the winding up. In my opinion therefore the judgment of the lower Courts cannot be supported and the appeal is allowed. The matter is remanded to the trial Court for disposal on merits.

[1] [1927] A. I. R. P. C. 70.

[2] (1913) 36 Mad. 185, P. C.

1940

VAZIRBHAI SULTANBHAI v. GADMAL NATHMAL

Kania J.

It is declared that the partnership was dissolved on January 16, 1933, and the plaintiff's suit is not barred by the law of limitation. The respondent will pay the costs of the appeal here and in the lower appellate Court. As regards the costs in the trial Court, on remand when the question of costs is determined, the trial Court will consider it in the light of the judgment of this Court on the questions involved in the appeal.

Decree reversed and case remanded.

J. G. R.

APPELLATE CIVIL

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

1940
February 5

AMBEDAS KASHIBHAI AMIN (ORIGINAL DEFENDANT), APPLICANT *v.* VADILAL CHHAGANLAL CHOKSEY (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act V of 1908), O. III, r. 4, Sub-r. 5—Original Side—Advocate enrolled on Original Side of High Court—Advocate appearing in Mofussil Court—Whether Vakalatnama necessary—High Court Rules, rr. 40, 45—Indian Bar Councils Act (XXXVIII of 1926), s. 14.

An advocate enrolled on the Original Side of the High Court is not required to file a Vakalatnama authorising him to appear in a Court in the mofussil.

The Court is not entitled to reject a memorandum filed by such an advocate under Sub-r. (5) of O. III, r. 4 of the Civil Procedure Code, 1908.

CIVIL REVISION APPLICATION against the order passed by D. V. Deshmukh, First Class Subordinate Judge at Thana.

The facts appear from the judgment of the Chief Justice.

M. G. Purohit, with *N. N. Majmudar*, for the applicant.

No appearance for the opponent.

* Civil Revision Application No. 225 of 1938.