

1967

Present : T. S. Fernando, J., and Alles, J.

S. R. KANDIAH, Appellant, and P. KANDASAMY, Respondent

S. C. 462/64 (F)—D. C. Jaffna, 374/M

Civil Procedure Code—Section 34—Scope—Partnership—Action between former partners—Period of limitation—Prescription Ordinance (Cap. 68), s. 6—Trusts Ordinance (Cap. 87), ss. 90, 111.

Section 34 of the Civil Procedure Code does not debar the institution of two separate actions on two different causes of action, even though the causes of action arise from the same transaction.

There is no fiduciary relationship between the partner who is the manager of the partnership funds of a business and another member of the partnership. Sections 90 and 111 of the Trusts Ordinance are not applicable in an action brought by the latter against the former for the recovery of his share of the capital of the partnership business.

Where a partnership agreement for the period 1st October 1948 to 30th September 1949 provided that the partners were to "receive or bear the profits or loss proportionately once in six months"—

Held, that the institution of an action by one of the partners for the recovery of his share of the profits for the second half-year of the partnership business was not a bar to the institution of a subsequent action by him for his share of the capital of the partnership business. The provisions of section 34 of the Civil Procedure Code could not prevent the plaintiff from maintaining the second action.

Held further, that a claim made by a partner for his share of the partnership capital from the managing partner is barred, under section 6 of the Prescription Ordinance, after six years from the date of the termination of the partnership. In such a case the provisions of sections 90 and 111 of the Trusts Ordinance are not applicable.

APPEAL from a judgment of the District Court, Jaffna.

C. Thiagalingam, Q.C., with P. Somatilakam, C. Ganesh and K. Kanag-Iswaran, for the 1st defendant-appellant.

S. Sharrananda, with P. Thuraiappah, for the plaintiff-respondent.

Cur. adv. vult.

July 19, 1967. T. S. FERNANDO, J.—

By a partnership agreement No. 521 of the 20th October 1948 (P1), the plaintiff, the 1st defendant (the appellant), the 5th defendant and another person of the name of Perambalam agreed to undertake the business of buying and selling Government arrack (arrack renters) for the period 1st October 1948 to 30th September 1949. In pursuance of this agreement the plaintiff contributed a sum of Rs. 13,423.60 as his

share of the capital of the partnership. In this action instituted on 1st June 1956 he seeks to recover this sum from the appellant together with legal interest thereon from 1st October 1949. Perambalam is dead, and the 3rd and 4th defendants are his heirs. The 2nd defendant is the husband of the 3rd defendant. No relief is claimed by the plaintiff from the 2nd to the 5th defendants, probably because it was his case that all the monies of the partnership business were throughout in the hands of the appellant. The trial judge has held (and this finding was not canvassed on appeal) that the appellant managed the entire business of the partnership. The agreement P1, it may be mentioned, provided for all monies of the partnership being in the custody of the appellant.

There has been much, perhaps too much, litigation between the parties to this appeal in respect of the monies forming part of the partnership business to which P1 relates. This is in truth the third action filed by the plaintiff.

Under clause 5 of P1 all the partners were to meet monthly and ascertain the correctness of the accounts and they were to "receive or bear the profits or loss proportionately once in every six months". Even before the term of the partnership ended, the plaintiff on 12th September 1949 sued the appellant in D. C. Jaffna case No. 5896 to recover his share of the profits for the first half-year of the partnership which he estimated as a sum of Rs. 9,000. He was successful (after two appeals to this Court) in obtaining judgment against the appellant in a sum of Rs. 3,766. In that case it was also determined that the sum contributed by the plaintiff towards the capital of the partnership was Rs. 13,423.60.

The plaintiff next filed a second case, D. C. Jaffna No. 8646, also against the appellant, in which he seeks to recover his share of the profits for the second half-year of the partnership, viz., 1st April to 30th September 1949. That case appears to have been laid by pending the determination of the present action (No. 374/M) which was instituted on 1st June 1956 and ended with the District Judge granting judgment for the plaintiff as prayed for, holding against the appellant, *inter alia*, on two issues raised by him, viz., that the plaintiff was barred from maintaining the action (1) by the Prescription Ordinance and (2) by the provisions of section 34 of the Civil Procedure Code. Argument on the appeal before us was confined to these two questions of law.

The argument for the appellant on the second of these questions could be dealt with concisely in the following way. The whole of the claim which section 34 requires the plaintiff to include in his action is limited to the claim in respect of the cause of action for which the suit or proceeding is instituted. That was indeed the view of the Privy Council in referring to a similar provision in the Indian Civil Procedure Code—see *Pittapur Raja v. Suriya Row*¹. In dealing with this very section the same judicial body stated in the local case of *Palaniappa v. Saminathan*² that it "is

¹ I. L. R. Mad. 520.

² (1913) 17 N. L. R. at 60.

directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies ”.

The case of *Somasunderam v. Sinnalamby*¹ on which the appellant relied is distinguishable as the cause of action in both cases there concerned was one and the same, viz., the refusal or failure of the defendant to account to the deceased partner's estate for the share of the profits due to it by the partnership. The present case bears some resemblance on this point to the case of *Saibo v. Abuthahir*². There it was stipulated by bond that the principal sum shall be payable on demand, and that the interest shall be payable for a period of four years once in six months and thereafter monthly. The Court ruled that the covenants regarding the payment of principal and interest were separate and independent, and that an action to recover the interest was no bar to a subsequent action to recover the principal. First when case No. 5896 was instituted, and later when case No. 8646 was filed, the cause of action relied on was the refusal or failure to pay the profits for the two half-years respectively of the partnership term as had been agreed upon in P1. The present case was founded on an entirely different cause of action, viz., the refusal or failure to pay back to the plaintiff the share of the capital contributed by him, and section 34 provides no bar to that claim. The trial judge was right in answering the relevant issue as he did and the argument for the appellant on the second question fails.

To turn now to a consideration of the first question of law, there can be no dispute that section 6 of the Prescription Ordinance ordinarily bars the maintenance of any action on the agreement P1 after the expiry of six years from the date of termination of the partnership. The trial judge, however, held against the appellant on this issue by reaching the conclusion that as sole manager of the partnership funds he became a constructive trustee in respect of the funds of the partnership. He referred to sections 90 and 111 of the Trusts Ordinance and, on the strength of certain observations of Lord Atkinson in *Hugh Stevenson and Sons v. Aktiengesellschaft Fur Cartonagen-Industrie*³ and of Bowen L. J. in *Scar v. Ashwell*⁴, held that the appellant was in a fiduciary position towards the plaintiff. With respect, the learned trial judge has misdirected himself in reaching this conclusion. Section 90 of the Trusts Ordinance deals with what are in the nature of secret gains made by persons who are bound to others in a fiduciary position, but the existence of the fiduciary relationship has itself to be decided according to the law applicable, and in the present case according to the law governing partnership which is the English Law. Nor does section 111 assist the plaintiff because sub-section (5) thereof excludes its application to constructive

¹ (1913) C.A.C. (Ceylon) 91.

² (1935) 37 N. L. R. 319.

³ (1913) A. C. 239 at 250.

⁴ (1893) 2 Q.B.D. at 396 and 397.

trusts except in so far as such trusts are treated as express trusts by the law of England. Text-books and decided cases are all against the maintenance of an argument that one partner stands towards another partner in the relation of an express trustee.

The observations of Lord Atkinson in the case referred to above are in the nature of an *obiter dictum* and the citation he relies on is from the dissenting judgment of Lord Hatherley in *Knox v. Gye*¹. The majority opinion of the House of Lords in this last-mentioned case was against the view expressed by Lord Hatherley. The Court there held that a surviving partner, not being a trustee for the executors of his deceased partner, the payment of a sum of money received from a debtor of the partnership within six years from the institution of the case did not take the case out of the Statute of Limitations. The *ratio decidendi* there really favours the argument for the appellant. Said Lord Westbury, one of the judges who formed the majority, "There is no fiduciary relation between a surviving partner and the representatives of his deceased partner: there are legal obligations between them equally binding on both". And again—vide p. 676—"There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in Equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal obligation which is thereby created". Lord Colonsay who agreed with Lord Westbury stated—at p. 677—"I hold that the Statute of Limitations does apply to a suit brought by the executor of a deceased partner against the surviving partner demanding an account of the partnership concerns; and I hold, that such is the relative positions of the parties, and that such is the demand made in this suit. I further hold that, in the general case, the *punctum temporis* from which the statutory period of six years begins to run is the date at which the partnership estate came to be vested in the surviving partner. At any time during the currency of that period the executor of the deceased partner may bring a suit demanding from the surviving partner an account of the partnership concerns, but after the statutory period has elapsed no such suit can be maintained".

The case of *Knox v. Gye* (*supra*) which Evershed M.R. in *Gordon v. Gonda*² referred to as a case of great complication was explained in the judgment of the Privy Council in the Indian case of *Gopala Chetty v. Vijayaraghavachariur*³ where Lord Phillimore went on to say "If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share."

¹ (1871) L. R. 5 H. L. 656.

² (1955) 2 A. E. R. 762.

³ (1922) 1 A. C. 488.

The text-writers are explicit on the question that the appellant has raised in this case.

(1) In Pollock's Law of Partnership (14th ed.)—p. 119—the position is stated thus:—

“ A surviving partner has sometimes been said to be a trustee for the deceased partner's representatives in respect of his interest in the partnership; but this is a metaphorical and inaccurate expression. The claim of the representatives against the surviving partner is in the nature of a simple contract debt, and is subject to the Statute of Limitations.”

(2) In Underhill's Law of Partnership (8th ed.)—p. 128—dealing with the question of the date when an outgoing partner's share is due:—

“ It may be mentioned here, that under arrangements for paying out the share of a deceased or outgoing partner the amount is a debt accruing at the date of the dissolution or death, and for the purposes of the Limitation Act, 1939, time begins to run from that date. ”

(3) In Lindley on Partnership—(12th ed.)—p. 344—dealing with the general duty of partners to observe good faith:—

“ It may, however, be observed that this obligation to good faith does not impose a fiduciary character upon the agency which exists between partners; for instance, the ordinary Statutes of Limitations apply to actions of account after a dissolution of partnership or the exclusion of a partner. ”

and, again—at p. 537—(dealing with the effect of the Statute of Limitations on Actions between Partners):—

“ So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the Limitation Act has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the Statute begins to run. This has been decided by the House of Lords in *Knox v. Gye*, in which a surviving partner relied on the Statute as a defence to a suit for an account instituted by the executor of a deceased partner. ”

The case of *Soar v. Ashwell* (supra) upon which some reliance was placed by the trial judge has no application to a case like the present which is an action between former partners. That was a case of a solicitor, a person in a special position, receiving money on behalf of certain trustees but retaining it in his own hands.

The misdirections referred to earlier led the learned trial judge to hold against the appellant on the issue of prescription. This action having been filed after the expiry of six years from the date of termination of the partnership, section 6 of the Prescription Ordinance rendered it unmaintainable. It should therefore have been dismissed.

I would allow the appeal and direct that the plaintiff's action be dismissed. The appellant is entitled to his costs in both Courts.

ALLES, J.—I agree.

Appeal allowed.
