

(1919) 03 MAD CK 0028
In the Madras High Court

Amalur Venkayya Naidu

APPELLANT

Vs

Vissa Lakshminarasayya and Another

RESPONDENT

Date of Decision : 26-03-1919

Acts Referred:

Citation : 58 Ind. Cas. 969

Hon'ble Judges : Spencer, J;Abdur Rahim, J

Bench : Division Bench

Judgement

Abdur Rahim, J.—The plaintiff had an agreement in his favour for sale of certain mica mines, the property of certain Marwaris of this town. The mines are situated in the District of Nellore. It appears that, in pursuance of that agreement, a deed of sale was executed, but it was not registered as the plaintiff was unable to find the entire amount of the consideration for it. Rs. 450, however, part of the consideration money, was recovered from him by a suit in the Small Cause Court. Subsequently, the plaintiff entered into negotiations with the 1st defendant, the 1st respondent in this appeal, with respect to the mines, I may mention that part of the property was free-hold and part of it was lease-hold. The term of the lease hold expired on 31st October 1907. The contract between the plaintiff and the 1st defendant is embodied in two letters, Exhibits C and C1, which were exchanged between the parties on 4th February 1907, and the constriction of those letters is one of the important questions for consideration in this suit. Thereafter, there was a conveyance of the property in the name of the 1st defendant, by the owner of the property and the plaintiff. The former has been described as the first vendor and the latter as the Second vendor. The property is conveyed to the 1st defendant for Rs. 1,250 and the document recites that the transaction between the plaintiff and the owner of the mines, fell through. So far as the deed of sale is concerned, there can be no doubt that it purports to be entirely in favour of the 1st. defendant, the consideration being Rs. 1,250. By the terms of this deed the plaintiff had no sort of interest in the property, but Exhibit I, i.e., the sale-deed, was undoubtedly executed in pursuance of the contrast between the parties as contained in Exhibits C and C1, the deed of sale having

been executed on 28th February 1907, that is, 24 days after Exhibits C and C1.

2. The first question which arises is, whether Exhibits C and C1 constituted a partnership between the plaintiff and the 1st defendant from 4th February 1907, or, at least, from the date of Exhibit I, by which the 1st defendant obtained a conveyance of the property and was thus in a position to work the mines.

3. The learned Subordinate Judge has held that there was no partnership created by Exhibits C and C1; but what those documents provided was that partnership in respect of the mines was to become operative only from the date when the Kararnama mentioned therein was executed according to the terms of those documents. The learned Subordinate Judge found that the time mentioned, within which the Eararnama was to be executed, was not intended by the parties to be of the essence of the contract, and no argument has been addressed to us to the contrary by the learned Vakil for the defendants. Exhibit C says that, as the plaintiff found it difficult to carry on the business, he agreed that the 1st defendant should buy the property and carry on business there crediting the sum of Rs. 450 which had been recovered from the plaintiff by the owner of the mines by a decree of the Small Cause Court, in the company's accounts or against the company, meaning by company the partnership the plaintiff undertakes to get a conveyance in favour of the 1st defendant, and then proceeds to stipulate that the 1st defendant should bear all the expenses of the working of the mines, carry on the business, take 14 annas in the rupee out of the profits, and pay the plaintiff the balance of 2 annas. Then, the last sentence of Exhibit C is in these words: "As soon as you pay the amount due to Kundamdass Garu (the owner of the mines), i.e., as soon as you pay the amount in my presences, you shall execute Kararnama with those conditions on proper stamp paper and register the same." The letter written by the 1st defendant, Exhibit C1, refers to the terms of Exhibit C as to the agreement between the parties. But it adds: "if this is not thus settled within the 15th of this month, I shall relinquish the same irrespective of all the conditions you executed in my favours." That is to say, if he failed to execute the Kararnama within the time mentioned, he (1st defendant) would give up all his rights in the property under these documents. Once it is conceded that time was not intended to be the essence of the contract--and it is not suggested that the Kararnama was to embody any terms not already set out in Exhibits C and C1--it seems to me to follow that the constitution of partnership between the parties was not made conditional or contingent on the execution of the Kararnama. The Kararnama was to be simply a memo, random reducing into writing, the terms already settled between the parties. The presumption in such a case is, that the contract was not a conditional one depending on the execution of the document but that it was a completed contract, and the rights of the parties would not be postponed till the execution of the contemplated document. The learned Pleader for the respondent refers to Exhibit I as somehow or other supporting his contention. But I do not think that Exhibit I supports the defendant's case in this respect at all. I am quite prepared to read Exhibits C, C1 and I together, in order to see whether there was a completed contract or not.

But the whole scheme seems to be that the defendant was to be purchaser of the properties for Rs. 1,250 and that Rs. 450 already paid by the plaintiff was to be treated on a different footing. It was for that reason that there was no mention of Rs. 450, or of the terms of partnership in Exhibit 1. I do not suggest thereby that the draftsman Could not have so drawn Exhibit I as to include also the terms of Exhibits C and C1 between the plaintiff and the 1st defendant in that document. I am of opinion that there was a partnership created between the parties on 4th February 1997.

4. The next question in this connection arises whether Rs. 450, which was paid by the plaintiff and which must be taken to be part of the consideration money that induced the owner of the mine to part with the property, was a contribution towards the capital of the business or was a loan by the plaintiff to the 1st defendant. In my opinion Rs. 450 was intended to be a loan, I think the words of Exhibit C are clear enough, for what it states is, that this sum was to be credited to the plaintiff in the company's accounts or against the company. If it was a contribution of capital, it could not be credited in his favour against the partnership. The claim of the plaintiff is that Rs. 450 was part of the capital supplied by him and, therefore, he was entitled to the property in that proportion, that is to say, in the proportion of Rs. 450 to Rs. 1,250 paid by the 1st defendant under Exhibit I. If that were so, there would have been some mention of that proportion in Exhibits C and C1. On the other hand, there is no such proportion mentioned and, so far as his share in the profits is concerned, there is an express stipulation that he is to get a 2 annas share in the rupee, that is, one eighth of the profits. As for Rs. 450, what the parties intended was that that was to be re-paid to the plaintiff. When we look to the facts of this case this view seems to be also in accordance with what is likely to have happened. The plaintiff, plainly, was an impecunious man and it was not until a suit was filed in the Small Cause Court and a decree obtained in it that the sum of Rs. 450 was realised from him. He might well have stipulated that this sum ought to be refunded to him. He stipulated that all the expenses for working the mines should be met by the defendant. He is to get 2 annas share of the profits, apparently for his services in securing the mine to the defendant, and this finds corroboration from the evidence of the 1st defendant, who says in cross-examination that it is the custom as regards mines to give a small share in the profits to the person who procures them. To the extent, therefore, of 2 annas there cannot be any doubt that the plaintiff was a partner. This is stated in so many words in Exhibits C and C1 with reference to the sum of Rs. 45, whether it was intended to be plaintiff's share of the capital or a loan I may also refer to his statement before the District Registrar (Exhibit IV) where he says that the defendant owed him Rs. 450 and complains that he had not yet repaid that amount to him. I shall now proceed on the basis that there was a completed contract of partnership between the parties in February 1907.

5. The next question is one of limitation. It is found by the Subordinate Judge that there was dissolution of partnership by reason of the proceedings in the suit

instituted by the plaintiff in 1910. The plaintiff based his claim on the terms of Exhibits C and C1, that is to say, on the clause which provided that, if the partnership Kararnama was not executed and registered within 15th February 1907, the defendant would lose all rights in the property which the plaintiff had agreed should be conveyed to him. Since no Kararnama was executed on that date, the plaintiff claimed that he became the sole owner of the mine. The defendant in his written statement, on the other hand, claimed that he was the absolute owner of the property, that it was "owing, to the laches of the plaintiff himself that the Kararnama, could not be executed in time, and that the plaintiff has no rights whatever with respect to the mines either as owner or as partner in the business. In paragraph 8 of the written statement it is stated: "As the plaintiff failed to carry out the arrangement effected on 4th February 1907, as the partnership Kararnama was not executed as intended, the plaintiff has lost his 2 annas share also. He also set up a subsequent arrangement which, if true, would still further support his contention. The plaintiff did not appear in the suit and adduced no evidence. The suit was, therefore, dismissed on 2nd August 1911. The suit was, however, restored on the application of the plaintiff and then he asked that he might be allowed to amend the plaint by asking for another alternative relief, namely, in case the Court held that he was not absolutely entitled to the property, that the defendant should be directed to execute the partnership Kararnama in his favour, for accounts and for 2 annas share in the profits on the basis of a partnership between him and the defendant. That amendment, however, was not allowed, but the order of the Court disallowing the amendment is not forthcoming, so we are unable to find out what the reasons were for not allowing the amendment. Then it appears that the plaintiff in 1914 applied for permission to withdraw the suit with liberty to file a fresh suit on the ground that he had been advised that the suit as framed was technically bad, apparently because the amendment sought for by him had not been allowed. Permission was granted to withdraw the suit with liberty to file a fresh suit on condition that the plaintiff paid the costs incurred by the defendant up to that date, on failure to pay the costs his suit was to stand dismissed. That order was passed on 20th January 1914. The plaintiff never paid the costs and the result was the suit stood dismissed. That is the history of the previous litigation. The question is whether, upon those facts, we can hold that the partnership was dissolved as the affect of the pleadings of the parties in that suit. The question is not quite free from difficulty, but, as the matter has been fully discussed at the Bar, I do not think any good purpose will be served by considering the matter any further. On the whole, I have come to the conclusion that there was dissolution. A number of rulings had been cited on this subject; their net effect is that no notice in any particular form is necessary to effect a dissolution of partnership at will in the absence of a stipulation to the contrary. Dissolution may be inferred from the circumstances of a case and from the conduct of the parties. The leading authority on the subject is the case of Syers v. Syers (1876) 1 App. Cas. 174 : 35 L.T. 101 : 24 W.R. 970, where the Lord Chancellor (Lord Cairns) says: "There is no technicality, no magic as to the mode of expression." Similarly

in *Pearce v. Lindsay* (1860) 46 E.R. 591 : 3 De. G.J. & S. 139 : 142 R.R. 41, it was held by Lord Chancellor Campbell and the Lords Justices, that the determination of an agreement of the nature of a partnership-at-will might result from the animus of the parties towards each other without any formal notice. It was argued by Mr. K. Srinivapa Aiyangar, the learned Vakil for the appellant, that there can be no dissolution unless there is an acknowledgment of partnership, coupled with an expression of desire that this partnership should be terminated. In *Syers v. Syers* (1876) 1 App. Cas. 174 : 35 L.T. 101 : 24 W.R. 970 the defendant alleged that the letter relied on by the plaintiff as stating the compact of partnership, only evidenced a transaction of loan thus repudiating plaintiff's claim that he was a partner. The defendant had written a letter to the plaintiff to that effect and it was held that that could not amount to dissolution. Lord Cairns states, "but when your Lordships look at that letter you find that it is a letter going entirely upon the theory of loan, offering to repay the money as a loan with a share of profits in lieu of interest, not taking any notice of a partnership or of any interest in assets, but, rather, bearing in opposition to the idea of a partnership. I cannot see how that letter could of itself operate as a dissolution of a partnership which was repudiated at that time." But then he goes on to add, "but the answer appears to me to stand upon a very different footing.... What it says in substance is this: "I, the defendant, as a matter of law, dispute that there is any partnership. I say that there is a loan and nothing but a loan; but if there is a partnership--if that point is decided against me, and if this, which is a question of law, is determined in favour of my opponent, if the Court says there is a partnership--then, I submit that it was effectually determined on the 1st of September by the letter," (which I before mentioned) "of the 20th of August." But if it was not terminated by that letter, there is in this answer the clearest intimation that the will of the partner, at whose will the partnership was constituted, is against any continuance of the partnership; and whether that will is expressed by a letter, or by an answer, or in any other way, is immaterial. There is no technicality, no magic as to the mode of expression." The case of *Parsons v. Hayward* (1862) 45 E.R. 1267 : 31 L.J. Ch. 666 : 8 Jur. (N.S.) 474 : 6 L.T. 523 : 10 W.R. 531 : 4 De. F. & J. 474 : 135 R.R. 249 was also much relied upon by Mr. Srinivasa Aiyangar in support of his proposition. But I do not think that it carried the matter any further than *Syers v. Syers* (1876) 1 App. Cas. 174 : 35 L.T. 101 : 24 W.R. 970. What is laid down there is, "it is not, as has been represented to me, a statement by the defendant to the plaintiff that he acknowledged there to have been a partnership, namely, a partnership, at will from the 31st July 1859, and that he was now desirous that that should terminate. But it is an unfounded assertion that this partnership had terminated on the 31st July 1859 and a continuous statement of the rights of him the defendant, founded upon the view taken by himself and persisted in by himself, I cannot accept this as an acknowledgment of a partnership at will and a termination of that partnership. I must regard it as being, what it really is, the same unfounded assertion of the final termination of the partnership relation which has been again made by the defendant in his answer, and which has been

the origin of this suit."

6. But it is apparent from what was held by Lord Cairns in *Syers v. Syers* (1876) 1 App. Cas. 174 : 35 L.T. 101 : 24 W.R. 970, that repudiation of partnership may be inferred from expressions used in circumstances which would amount to an intimation of the will of the party that there should be no continuance of the partnership. Here both the parties contended in the proceeding in the previous suit that each of them was absolute owner of the property, and the defendant expressly stated that the plaintiff had no rights as a partner or as owner of the property. When each of them claimed to be exclusive owner of the mines, I think they must be taken to have intimated their will against any continuance of partnership; in the language of Lord Cairns, in *Pearce v. Lindsay* (1860) 46 E.R. 591 : 3 De. G.J. & S. 139 : 142 R.R. 41 the learned Lord Chancellor and the Lord Justices inferred dissolution of partnership mainly from the absence of correspondence between the parties for a period of nearly nine years, the nature of the partnership being such as to entail correspondence for the carrying on of the business as contemplated by the contract. In this case each of the parties claimed the mines as his own exclusive property and one would be fully warranted to infer from this that, in case the claim of both the parties was unfounded, they did not, in any event, intend to continue in partnership. In both *Syert v. Syers* (1876) 1 App. Cas. 174 : 24 W.R. 970 and *Parsons v. Hayward* (1862) 45 E.R. 1267 : 31 L.J. Ch. 666 : 8 Jur. (N.S.) 474 & 924 : 6 L.T. 523 : 10 W.R. 531 : 4 De. F. & J. 474 : 135 R.R. 249 the repudiation of partnership was by only one of the parties, the other party insisting throughout that he was a partner. That circumstance is enough to distinguish the present case from the facts of those cases. But I think this case is covered by the principle enunciated by Lord Cairns in *Syen v. Syers* (1876) 1 App. Cas. 174 : 35 L.T. 101 : 24 W.R. 970, that dissolution of a partnership at will be inferred from the date when the will of one of the partners is shown to be against the continuance of the partnership. In that view, the suit will be barred by limitation.

7. It was also argued by the learned Vakil for the respondent that, even if there was no dissolution, the suit will be barred, inasmuch as the plaintiff was excluded from partnership from at least 1910, that is, more than six years before the present suit. He contends that Article 120 of the Limitation Act would apply. I think this contention also is well founded. Mr. Srinivasa Aiyangar has very strenuously argued that Article 106 applies or 131 or 115. I do not think Article 106 can apply to the facts of the case, for it is not an Article which deals with cases of exclusion of a partner. It applies to suits for an account and a share of the profits of a dissolved partnership, the time running from the date of the dissolution. The main object of the present suit is the establishment of the plaintiff's right as a partner, inasmuch as those rights had been denied by the defendant. He does not even ask for a dissolution, although the Court might decree dissolution if his claim was well founded and the suit was in time. Any way, it is not an ordinary suit for an account on the basis of a dissolved partnership. Article 131 deals, with suits to establish a prejudicially recurring

right. The time from which the period begins to run is when the plaintiff is first refused the right of enjoyment. It is difficult to see how the present case can be said to be a case of periodically recurring right. The plaintiff is a partner; his right is to ask for dissolution and accounts. He is not entitled to ask for these reliefs at stated periods. There is only one remedy to which he is entitled, that is, to ask for accounts and for a decree for his share of the profits. The same objections would apply to the application of Article 115. There is no case of successive breaches here. The argument of Mr. Srinivasa Aiyangar is that, if the contract of partnership was subsisting and it could not become extinguished by efflux of time--then it is a suit covered by Article 106. If that argument was sound, then a person claiming to be a partner in a concern might take no step whatever for years, and practically evade limitation altogether. This is certainly inconsistent with the scheme of the Limitation Act which provides a general residuary Article for all suits not covered by a specific Article. That is to say, the Indian Legislature has laid down a limit of time for all suits. There is no specific provision for a suit like this where a person claiming to be a partner, and whose rights have been repudiated by the defendant seeks to establish his right as a partner and asks for other consequential reliefs, I hold, therefore, that Article 120 would apply to this case if there was no dissolution, and the suit would be barred as more than six years have elapsed from the date on which the defendant denied the rights of the plaintiff. This view, I may mention, is supported by a ruling of the Calcutta High Court in *Dwarkanath Das Karnani v. Chuni Lal Daga* 12 C.W.N. 455.

8. I am also of opinion that the plaintiffs' present suit fails by virtue of Order II, Rule 2, Civil Procedure Code, corresponding to Section 43 of the old Civil Procedure Code. It is not necessary to discuss the lulling, which are numerous, on the question as to what constitutes cause of action." That is to be determined with reference to the facts which gave rise to the previous suit, the scope of that suit and the reliefs that might then have been claimed. The cause of action in the present case is based on the contract of partnership as contained in Exhibits C and C1. There can be no doubt about that. The suit of 1910 was also, in my opinion, based upon that contract. It is clear from the history of that suit which I have already recited and the evidence in the case that, even before that suit was instituted, the defendant had denied plaintiffs' all rights based on Exhibits C and C1. He denied his claim to ownership of the property and also that he was a partner in the concern. It was under those circumstances that the plaintiff came into Court. In his plaint he first asked that his right to the property might be established basing his claim on the terms of Exhibits C and C1; but if that claim was not sustainable it was open to him to claim relief on the basis that he was a partner of the defendant and entitled to two annas share in the properties. In fact, he did afterwards seek to amend the plaint by asking for reliefs on the basis of a partnership and it was not seriously disputed that such relief was open to the plaintiff even if his higher claim was found to be unsustainable. I think this case comes very close to the facts of the Privy Council

case in Rangayya Goundan v. Nan appa Rao 21 M.K 491 : 6 C.W.N. 17 : 3 Bom. L.R. 799 : 8 Sar. P.C.J. 117 : 28 I.A. 221 and I shall satisfy myself with only citing one observation of their Lordships from that judgment: "The agreement was the cause of action in Suit No. 73 of 1891. There was no other. The purchasers, it is true, said only for possession; but, independently of the agreement, they had no claim to the possession which was refused to them, nor to the management which was allowed to them. The vendors asserted that the agreement was no longer in force. The obvious course for the purchasers was to demand completion of it. For some reason or other, they did not do so. They did make the agreement the basis of a claim for possession and damages. In this suit they make it a basis of a claim for transfer of the estate. But that is precisely what the Code says they shall not do."

9. The result is the appeal is dismissed with costs.

Spencer, J.

10. I am of opinion that a partnership was created by the execution of Exhibits C and C1 and that the mention in the former document of "this company's" (that is to say, the partnership's) accounts is a very significant indication of the intention of the contracting parties in this matter. I think that, by this sentence, it was intended that the firm should thereupon become indebted to one of the partners, namely, to the plaintiff to the extent of Rs. 450 which was the sum advanced by him in the first instance to the original owners of the mine. I am inclined to think that the execution of the Kararnama by the 15th February was, on the 4th February 1907, intended to be a material condition of the contract as the words at the end of Exhibit C1 are so emphatic, namely: "If this is not thus settled within the 15th of this month, I shall relinquish the same irrespective of all the conditions which you executed in my favour;" and in his plaint in the prior suit the plaintiff in paragraph 13/(f and g) of Exhibit IX and the defendant in paragraphs 4 and 8 of his written statement, Exhibit X, showed that they so understood their agreement of the 4th of February, But I think that both parties subsequently showed by their conduct that they waived any right either side may have had to damages arising from the breach of this condition to have a formal agreement drawn up within the date stated or to insist on its performance on any subsequent date by the fact of the defendant taking the sale-deed, Exhibit I, on the 28th February and the plaintiff sending, on 13th September 1897, a lawyer's notice, Exhibit III, threatening a suit to compel the defendant to get a deed of partnership executed and then doing nothing more till he sued in February 1910 to establish his right to the mine. The plaintiff also admitted before the Registrar (vide his statement Exhibit IV) that he executed the sale-deed, and that he had no objection to its registration. So it is not now open to either party to treat the partnership as an incomplete contract.

11. The present suit has been brought for a declaration of the plaintiff's title to a 9/34ths share in the mine and to recover profits from the working of the mine at the rate of 2 annas in the rupee from the date of the 1st defendant's taking

possession of the mine and for accounts. The lower Court has held that the plaintiff has no subsisting cause of action and has dismissed the suit both, as time barred and as barred under Order II, Rule 2, Civil Procedure Code, by reason of the previous litigation between the parties in Original Suit, No. 993 of 1910 on the file of the District Munsif of Kavali, which was renumbered as 199 of 1913 on the file of the Additional District Munsif of Nellore.

12. In the plaint in the present suit the plaintiff claims that he is entitled to the profits of the mine as they arise under the contract and states that he is advised that it is not necessary to ask for dissolution of the partnership or for the sale of the mine. But, he says, he can claim an account of the profits from the time that profits were received, and that, at any rate, he is entitled to ask for profits arising within six years from the date of the plaint as his right is one accruing from day to day. He states the date from which limitation began to run as some time at the close of 1915, when the 1st defendant finally refused to share the profits with the plaintiff. He does not allege any Act of expulsion from the partnership in his plaint, and in his evidence he admitted that he did not issue any notice for the payment of his share in the profits, that after the suit of 1910 he did not demand any share in the profits and that he did not go to the mine or do any business there, although he knew from the beginning that the mine was yielding well, If we now refer to the plaint in the former suit, Exhibit IX, and to the written statement, Exhibit X, it is clear that the plaintiff and the defendant at the time of that suit both treated the partnership as not subsisting on that date, each of them claiming the mine as his own exclusive property. This partnership being not for a fixed term put being one terminable at will, after such an expression of will, it is not open, in my opinion, to the plaintiff to treat the partnership contract as still in existence at the institution of this suit, seeing that the continuance of the relationship of partners depended on the animus of the parties to continue as partners. I hold, therefore, that the partnership was dissolved at least from the date of the suit of 1910, the plaint and the written statement being tantamount to notice of dissolution served by either party on the other. The present suit for an account of the profits having been instituted more than six years after dissolution is thus barred by limitation. The appellant's contention that this suit could be treated as one under Article 131 of the Limitation Act to establish a periodical recurring right is not tenable, in the absence of any fixed dates for ascertaining profits and paying each member of the firm his share.

13. Then, so far as the present suit was a suit to establish the plaintiff's right to a 2-annas share in the profits and for taking an account, which is the substantial relief claimed by him in this suit, the prayer for declaration being only subsidiary to the main, relief, I agree with my learned brother and the Judge who tried the suit in the Court below, that the suit is barred by Order II, Rule 2, Civil Procedure Code, That rule requires that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and it declares that where a plaintiff omits to sue in respect of, or intentionally

relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. In the suit of 1910 the plaintiff showed by his petition for amendment (Exhibit XII) his consciousness that a claim to share in the profits was a part of the claim arising out of his then cause of action. As under the original agreements, Exhibits C and C1, no time was fixed for calculation and payment of the profits, it must be taken that the plaintiff would be only entitled to a division of profits either on dissolution of partnership or upon expulsion there from. In this case he has not shown that he has any fresh right of action owing to expulsion or dissolution of partnership accruing to him subsequent to the disposal of the suit of 1910; nor has he shown that he ever demanded, at any date, between that suit and the present suit, his share of the profits and that the defendant wrongfully refused to give him his share. In this way, the plaintiff has no claim to put forward in this suit which he could not have put forward in the former suit upon the same cause of action. The suit was, therefore, rightly dismissed and the appeal must also be dismissed with costs.