
(1910) 01 MAD CK 0050
In the Madras High Court

Cotha Krishnaswami Chetty

APPELLANT

Vs

Thatha Seetharam Chetty and Another

RESPONDENT

Date of Decision : 19-01-1910

Acts Referred:

Citation : 5 Ind. Cas. 374

Hon'ble Judges : Sankaran Nair, J;Benson, J

Bench : Division Bench

Judgement

1. The plaintiff's father Ethirajooloo Chetty and the defendants were partners, carrying on their business under the name of Moses, and Co. Ethirajooloo died on the 5th July 1904 and on the 12th December 1904, the plaintiff executed a deed of release by which he renounced all his interest in the firm and its properties for the consideration therein recited. The suit out of which this appeal arises was instituted to set aside that deed of release for fraud and undue influence and for an account of the assets and liabilities of the firm on the 4th July, 1904, and for payment to the plaintiff of his share so ascertained. The learned Judge who tried the case dismissed the plaintiff's suit and this is an appeal from that decree.

2. In order to decide whether the release is binding on the plaintiff it is necessary to consider the circumstances under which it was executed. Shortly before his death Ethirajooloo Chetty wished to dissolve the partnership and requested Mr. Krishnasami Chetty, a High Court Vakil, to take the necessary steps. It was intended that he and Subbia Chetty, another High Court Vakil, should, act as arbitrators, but before the arrangements were complete Ethirajooloo died. After his death, the plaintiff was unwilling to remain in the firm. From this point there is a conflict of evidence as to the course of events. The Judge entirely accepted the evidence of Mr. Krishnasami Chetty, and we see no reason to differ from his estimate of the oral evidence. We, therefore, disregard the rest of the oral evidence, when inconsistent with that of Mr. Krishnasami Chetty. The evidence proves the following facts. After the death of the plaintiffs father, the plaintiff requested Mr. Krishnasami Chetty to help him in settling affairs connected, with

his leaving the firm: the defendants also requested him to do so. Though an intimate friend of Ethirajooloo, as he was not a friend of the plaintiff, Mr. Krishnasami Chetty, therefore, requested the plaintiff to name some person to act with him, and at the plaintiff's request Krishnasami Chetty agreed to act with Narasimhaloo now deceased. These two arbitrators and the parties and the plaintiff's brother-in-law met at the house of Seetharam Chetty, the 1st defendant. It was then agreed that the defendants should take an account of the stock of the firm and value it in the presence of the plaintiff and his brother-in-law; and it was also agreed that if the plaintiff, who had apparently an idea of carrying on business on his own account, desired to have the whole stock or any part of it at the valuation put on it by the defendants, he should be entitled to have it. The defendants invited the plaintiff to be present at the stock-taking with his brother-in-law and the latter's brother, to see that it was taken properly. The brother-in-law's brother was one Cannan Chetty, who had been employed in the firm by the plaintiff's father, who was his maternal uncle. It had been arranged at the meeting that Cannan Chetty was to assist the plaintiff. He accordingly attended every day and took notes. The plaintiff and his brother-in-law did not attend every day, but occasionally whenever they cared to do so. Cannan Chetty had been employed in the firm from 1893 to 1900. He had taken part in the stock-takings of 1893, 1895 and 1898. He was undoubtedly a competent man for the work he had to do and we may add that we entirely agree with the learned Judge in finding that the plaintiff far from being a young man of weak intellect and easily imposed upon, as his Vakil suggests, is a shrewd man of some 24 years of age and well able to look after his own interests. The valuation of the stock commenced on the 7th September. The goods in the shop had tickets attached to them. In the case of imported goods the tickets contained the invoice number, the costs or invoice price in code language and the sale price. It is, no doubt, said on behalf of the plaintiff, that the tickets were missing in many cases. But the goods which had no tickets and about the value of which Cannan Chetty had any suspicion, were very few in number, less than half a dozen. Cannan Chetty had access also to the invoice book which shows the price of every article and the date of its arrival. He prepared what are called the stock sheets which apparently contained all the information he wanted with his remarks in regard to various matters. They were not now produced at the trial on the side of the plaintiff in whose possession they ought to be and the explanation for their non-production is unsatisfactory. The plaintiff also made his own notes Exhibit 34. Exhibit 33 is a memo, of objections to the stock-taking in the handwriting of Cannan Chetty. A copy of this is attached to and forms a part of Exhibit 10, which embodied all the objections the plaintiff and his advisers had, to the stock valuation. In it the plaintiff pointed out, that in the course of stock-taking the defendants were guilty of omitting many goods from their lists and he referred to certain instances, where the defendants entered them in the lists after the omission was pointed out to them. The plaintiff also charged the defendants with concealment of goods, and with instructing their subordinates to conceal them just before they went to each department for stock-taking. He also referred to

the fact that the values fixed by the defendants ranged from 15 to 85 per cent, of the invoice prices. The valuation of the Boots and Harness department was stated to be a mere sham. On receiving this objection Mr. Krishnasami Chetty issued further instructions, Exhibit 21, in which he directed that stock should be taken by the plaintiff of the Harness Department, that the defendants should make out a statement of stock pointed out by the plaintiff to have been omitted and that the plaintiff should also have the help of Jagannatham, an assistant in the shop. An account was also to be made up of goods sold subsequent the 5th July. The defendants subsequently submitted the abstract statement Exhibit 23, which includes also the cost of goods sold after the 5th July. They made the valuation of these goods on the footing that one shilling should be regarded as equal to 10 annas. But Mr. Krishnasami Chetty and Narasimhaloo Chetty held that it should be counted as 12 annas. After some objection the defendants yielded. The effect of this alteration from 10 annas to 12 annas was to add Rs. 6,000 to the plaintiff's share. Then there were certain damaged goods which were set apart by the defendants to be sold by auction, as according to the defendants no satisfactory valuation of them could be made. The arbitrators valued them so as to add to the plaintiff's share about Rs. 3,000. The plaintiff thereupon abandoned his objections. The arbitrators then considered that it would be well to have a submission in writing from the parties and on their so informing the parties the defendants on the 9th November, 1904, wrote Exhibit XIA in which they agreed to abide by their decision. The plaintiff's submission is dated the 5th December. The arbitrators then worked out the figures, and the paper was shown to the plaintiff, who told Krishnasami Chetty that he was satisfied. The plaintiff's share was valued at Rs. 40,000, though the correct amount according to the figures was a little less. He had already received Rs. 4,000 a sum of Rs. 5,000 was payable by the plaintiff to the 1st defendant, and Rs. 1,000 was paid in cash. It was agreed that the balance (Rs. 30,000) should be paid to the plaintiff in monthly instalments of Rs. 1,000, with interest at 9 per cent, and the necessary deeds, including the deed of release Exhibit II, were executed to give effect to this arrangement. The decision was declared by the arbitrators in the plaintiff's presence. There was, however, no award in writing as the parties thought it would be sufficient to actually carry out the award. The plaintiff received his instalments for 16 months, and then refused to receive anything further on the ground that he had been defrauded and brought this suit. The plaintiff alleges:

That the defendants have grossly undervalued the stock in trade, that they have omitted to place any value on the so-called damaged goods and cut pieces, that they have not valued the goodwill of the firm, that debts to the extent of Rs. 56,000 have been represented as bad though many of them were in fact good debts, and that the defendants falsely represented that the business had been worked at a great loss.

3. As to the omission to place any value on the damaged goods, it has been already stated that the plaintiff's share on these was valued by the arbitrators at

about Rs. 3,000 and the appellant's pleader has not pointed out that there were any other damaged goods than those referred to by the arbitrators. Nor is there any reliable evidence to show that the defendants told the plaintiff that the business had been worked at a loss or that the plaintiff acted on any such representation. It is, no doubt, a matter for observation that the goodwill has not been valued. But the plaintiff and his advisers knew of the omission at the time. The submission to arbitration in writing was made with that knowledge and the plaintiff chose to accept the settlement with that knowledge and received payments under it for 16 months. He was quite competent to look after his own affairs, and it is not now open to him; to contest its validity on that ground. With reference to undervaluation and bad debts, it was strongly pressed upon us, that the learned Judge shut out the evidence intended: to prove the plaintiff's contentions in regard to them. With reference to the valuation of the goods the arrangement was that the plaintiff, who apparently had some intention of himself opening a shop, should be entitled to take for himself any goods which were: not properly valued by the defendants, and the plaintiff had the same facilities for valuing them as the defendants, with whom, so far as this valuation was concerned, he was certainly dealing at arm's length. In these circumstances we are of opinion that there is no foundation for the contention that the plaintiff is now entitled to claim a re-valuation. It is clear from Cannau Chetty's evidence that the plaintiff's interests were carefully looked after, and that he and the plaintiff were fully aware of the so-called undervaluation. There was no misrepresentation nor did the plaintiff act upon any statement by the defendant. Exhibit 10 shows that almost all the objections, if not all, that are now raised were then taken, and it was, therefore, with full knowledge of the facts that the plaintiff finally accepted the settlement proposed. He cannot, therefore, be allowed to re-open the settlement on this ground, nor was he prejudiced by the exclusion, if any, of evidence at the trial with regard to the valuation of the goods. It was also urged upon us that the accounts would show that in the stock-taking during the previous year, the invoice price was accepted for the purpose of valuation. The deed of partnership does not require the acceptance of that price in valuing the share of a retiring partner or of the representative of a deceased partner, and its adoption for one purpose does not show that the same mode of valuation must be adopted for other purposes. On the other hand it is obvious that a valuation for the purpose of paying a partner the value of his share in cash, would be likely to be on a lower scale than the biennial valuation contemplated by the partnership deed. It was also open to the plaintiff not to insist upon a valuation on the same basis as the biennial valuation and there can be no doubt that Caiman Chetty, who was a party to the stock-taking on the three previous occasions knew that a different method was pursued in 1904. He must have told this to the plaintiff will therefore, accepted the award with that knowledge.

4. Another contention urged before us is that the plaintiff relied upon the representation made by the defendants to the arbitrators that the "cost of goods

sold for cash and on credit sales from 5th July 1904 to 10th September 1904 inclusive" was Rs. 5,706 while the accounts filed in Court, showed that the goods were sold for Rs. 21,359-3-9. It was urged on the plaintiff's behalf that on objection being taken by him Mr. Krishnasami Chetty in Exhibit 22, directed the defendants to submit an account of goods sold and used after" the 5th July, and this entry of Rs. 5,706 in Exhibit 23, was put forward as the value of these goods and was accepted as such by the plaintiff. The discrepancy between Rs. 5,706 and the sale price of the goods was sufficiently striking to require explanation. We, accordingly, took further evidence in appeal in regard to this matter. Mr. Krishnasami Chetty swears that he and Narasimhaloo the other arbitrator considered the question of the plaintiff's right in regard to the goods sold after the 4th July and they arrived, at the conclusion that the right thing was to give the plaintiff credit only on the basis of the cost price (i.e. invoice price) of the articles sold and not on the basis of the sale price which, of course, is very much larger, and he has given, in his evidence, some of the reasons which influenced them. In cross-examination it was attempted to show that those reasons were not satisfactory. We have, for the purpose of deciding this question nothing to do with the soundness of those reasons. Mr. Krishnasami Chetty directed the defendants to prepare the account on a certain basis, and Exhibit 23 was so prepared. This evidence exonerates the defendants of all suspicion of fraud in connection with this part of the valuation. It also disproves the suggestion, based on the vernacular term used in Exhibit 23A, that the defendants intended the entry in Exhibit 23 to be understood as giving the sale price, not the cost price. It is true that Mr. Krishnasami Chetty admits that the plaintiff may not have been present when these instructions were given to the defendants. But he says that when this matter was discussed afterwards, all the parties were present and he had no doubt from the plaintiff's conduct that he was well aware of the true facts. The plaintiff was given Exhibit 23. Narasimhaloo the other arbitrator, who took part in settling that the plaintiff was to get only the cost price was his relation and Mr. Krishnasami Chetty's wears he was in close touch with him. There can, therefore, be no doubt that the plaintiff could not have misunderstood the entry in; Exhibit 23. His own evidence which we cannot accept, as it is, indirectly contradicted by Mr. Krishnasami Chetty, is that Exhibit 23 was not given to him at all. We are, therefore, clearly of opinion that he entered into the agreement with full knowledge of the basis on which the figures Rs. 5,706 were arrived at. It was then contended that the statement submitted by the defendants with reference to the debt shows fraud. In Exhibit 23, the amount of Rs. 80,096-9-2 is shown as "good debts," Rs. 42,612-9-11 as "doubtful" and Rs. 56,226-6-9 as "bad." The evidence as to the date of the submission of Exhibit 23 to the arbitrators is not clear. But it must have been later than the 8th November, the date of Exhibit 9. The plaintiff's pleader has submitted a statement from which it appears that out of the debts shown as bad, a Sum of Rs. 916-2-0 at least was collected before the 8th November and similarly a sum of Rs. 3,393-3-7 at least of the so called doubtful debts was collected. With reference to this Mr. Krishnasami Chetty's evidence (which we accept) is to this effect.

When he received this Exhibit 23, he delivered it to the plaintiff to state his objections to it, if any. If the plaintiff had been an ignorant man, he (the arbitrator) would have probably gone into the accounts himself but in this case he did not think it necessary to do anything beyond calling upon the plaintiff to raise objections to the account. He knew that the plaintiff's father had a list of debts prepared in his life-time and he believed that the plaintiff had this list. Narasimhaloo Chetty, the other arbitrator, also told him so. The plaintiff and Narsimhaloo, who were related to each other, were in frequent consultation about this matter and in these circumstances when the plaintiff having kept Exhibit 23 for about a fortnight accepted the statement and said he was quite satisfied with it, he (Krishnasami Chetty) felt that any enquiry was unnecessary. If the plaintiff had raised any objection he would have enquired into it. At the same time he says that if he had known that any debts had been collected, he would not have allowed them to appear in the list of bad and doubtful debts. Now Exhibit 23 is only a presentation by the defendants that the debts due to the firm should in their opinion be classified as therein shown. There is no list of separate debts in Exhibit 23 but only the total of debts under each of the heads good, "bad", and "doubtful", and it is incredible that the plaintiff and his advisers Coorathalwar Chetty and Cannan Chetty would have accepted that statement without investigation. The plaintiff admits that he had some extracts or copies of the account books of the firm with him which enabled him with the help of others to find out, long after the release, that he was entitled to a sum far in excess of the amount allowed to him, and that the defendants had been guilty of fraud. This confirms the evidence of Mr. Krishnasami Chetty that he had his father's reapers concerning the firm and ample means of checking any account that was prepared by the defendants. When he had the means of detecting any inaccuracy or fraud practised on him, it is impossible to believe that he did not avail himself of it. There is no evidence that he wanted any further information which was refused. It seems clear that he and his advisers must have satisfied themselves from an examination of their own accounts and further inquiries, that the defendants' list might be accepted. Otherwise there is no explanation forthcoming of the plaintiff's conduct in informing Mr. Krishnasami Chetty that he was satisfied. But he was entitled to insist upon the defendants, making a true statement, and the defendants were not justified in entering debts as bad or doubtful when they had been already collected. Seetharam Chetty (1st defendant) now admits that it was wrong not to have given credit to the plaintiff for his share of the debts collected. The debts collected after the 4th July would not appear in the accounts before that date which were all that the plaintiff had. The defendants alone had that information. They were, in the circumstances, bound to disclose it to the arbitrators, and the plaintiff, the representative of the deceased partner. The question then is what is the relief to which the plaintiff is entitled. If there had been any intention to deceive the plaintiff, and the plaintiff had been defrauded, then the entire account would have to be re-opened. But the facts do not show any fraud of that kind. The clerk who prepared the accounts is dead. Some of the debts collected have been brought into the

account. Seetharam Chetty says that he gave directions in September to prepare a correct list, and he delivered the list so prepared. The heading of Exhibit 23,rs that it was made up to the 4th July 1904 and it is probable that a classification was made of the debts as they appeared in the list made before that date, with such further entries of the debts collected as were within the knowledge of the clerk who prepared the list. At any rate there is clearly no evidence of any intention to defraud. The proved facts rebut any such inference. It is not a case in which the agreement must be upheld or set aside in its entirety. The consent of the plaintiff to the other items of the settlement was not dependent upon any conclusion that might be arrived at "about the debts, and there is no reason alleged why he should not be held bound by the arrangement so far as the other debts are concerned. If the collection of these debts had been brought to his notice or the notice of the arbitrators, it would only have resulted in these debts being placed in the category of good debts. He is, therefore, only entitled to be restored to the position he would have occupied before he accepted this classification. We shall accordingly direct the defendants to file a statement of the debts collected after the 4th July within 14 days. The defendants will furnish the plaintiff's pleader with a copy and the plaintiff will be allowed 14 days from that date to surcharge and falsify. As to the date of the submission of Exhibit 23, the evidence is not clear: Seetharam Chetty stated on the first occasion that it was in December : when examined before us, he said it was about the 9th November. There is no documentary evidence about the date and as Seetharam Chetty only trusts to his memory and he has given different dates, we shall direct him to give the list of debts collected before the date of release.

5. It is also contended before us that for two debts shown as bad debts a mortgage instrument for Rs. 7,235 was taken on the 16th November, 1904 and it is contended that this also should be treated as a good debt. But there is nothing to show that in the true opinion of the defendants the debt was not, and is not still a bad debt. The allegation, that nothing has been paid towards principal or interest for over ten years, is not denied and there is no evidence to show that it is good debt or that the defendants must have believed it to be a good debt. There is also no evidence that the plaintiff was not given credit for the goods sold between the 1st and 4th July.

6. On behalf of the respondent, it is contended that the suit is not maintainable, as there is a binding award. Paragraphs 21 and 22 of the deed of partnership provided that disputes should be referred to arbitration. In this case, as already pointed out there was also a written submission to arbitration, but there was no written award. Section 11 of Act IX of 1899recuires that the award should be signed and filed. The arbitrators are bound at the request of any party to file the award or a copy thereof in Court and such an award unless it is set aside or remitted for reconsideration becomes enforceable as if it were a decree of Court. The writing and signing of an award is not, therefore, a formality that may be dispensed with by the parties. It stands in this respect on the same footing as a decree. We are, therefore, of opinion that the plaintiff's claim is not barred by

any award.

7. The plaintiff is entitled to a sum of Rs. 1,144-5-9 according to the statement now filed in pursuance to our order with interest at 9 percent, from the date of the promissory-note. Mr. Ramachandra Aiyar further claims payment of the amount due under the promissory-note. The defendants do not deny their liability to pay and they submit they have been, always ready and willing to pay, but they contend that no decree for the same should be passed in this suit and we think they are right.

8. As to costs, the plaintiff must pay the defendants' costs in the lower Court and we are not prepared to interfere with the learned Judge's order on that point. But in the circumstances of the case we direct each party to bear his own casts in appeal.