

(1917) 03 MAD CK 0053
In the Madras High Court

R. Ramchandra Naidu and Others

APPELLANT

Vs

Malang Hyath Batcha Saib and Others

RESPONDENT

Date of Decision : 27-03-1917

Acts Referred:

Citation : 43 Ind. Cas. 661

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Single Bench

Judgement

Kumaraswami Sastri, J.—This is a suit filed by the heirs of one Tirumalasami Naidu for taking partnership accounts. By a deed of partnership," dated the 7th January 1901 (Exhibit Q), the 1st defendant, Tirumalasami Naidu (whose heirs the plaintiffs claim to be), the late Muthuswami Naidu, the late Abdul Rahiman Sahib and one Kothandaramiah Chetti entered into a partnership agreement for carrying on business for five years from 1st January 1901. On the expiry of that period Kothandaramiah Chetti left the partnership and a fresh deed of partnership (Exhibit R, dated 29th January 1906) was entered into between the 1st defendant, the deceased Tirumalasami Naidu and the deceased Muthusami Naidu whereby they agreed to carry on business under the name and style of M.A. Hyath Batcha Sahib and Co., for a further period of five years from the 1st January 1906 with the option to continue the partnership thereafter on the same terms. Kothandaramiah Chetti, who was a partner in the business previous to the 29th January 1906, executed a release deed (Exhibit III, dated 31st January 1906) in favour of the other partners. The partnership under Exhibit It went on for five years and on the 23rd February 1911 the parties to Exhibit Reentered into a fresh deed of partnership (Exhibit S). The important terms were that they should carry on the business for five years from 1st January 1911 under the name, style and firm of M.A. Hyath Batoha Sahib & Co., that the capital of the partnership should in the first instance be Rs. 3 lakhs and be laid out by Malang Abdul Rahiman Sahib and Malang Hyath Batcha Sahib, that the other two partners should have the option of laying out capital, that the capital laid out by them and the other two partners should carry interest at 9 per cent.per annum,

that the profits of the firm should be divided into 18 shares, nine of which should be paid to Abdul Rahiman and Hyath Batcha, five shares to Muthusami Naidu and "four shares to Tirumalasami Naidu, that the accounts of the partnership should be made up at the end of every year and the losses borne by the partners in the proportion of profits to which they are entitled, that the business should be carried under the management of Hyath Batcha Sahib, Muthusami Naidu and Tirumalasami Naidu and that in case of difference of opinion the decision should rest with the majority. The business went on under this deed of partnership. In 1913 Abdul Rahiman Sahib (one of the partners) died leaving him surviving the 2nd defendant his son, third defendant his widow and the 5th defendant his daughter as his legal rapresentatives and the other partners continued to carry on the business under the same conditions as before. Tirumalasami Naidu died in November 1915 leaving the 1st plaintiff his brother and defendants Nos. 2 to 6 his sons, and Muthu-sami Naidu died in February 1916 leaving the 4th defendant his son and legal representative.

2. The case for the plaintiffs is that the 1st plaintiff is the undivided brother and plaintiffs Nos. 2 to 6 are the undivided sons of the late Tirumalasami Naidu and that they are entitled to an account of the partnership and to payment of what is due to Tirumalasami Naidu. It is alleged in the plaint that the three partnerships referred to above are really one partnership, the business under each deed being only a continuation of the business done under the preceding document, that a sum of a lakh of rupees, deposited with Graham and Co. as security, is a partnership asset, that Rs. 25,000 kept as a sinking fund in suspense account is to be brought into the partnership account, that the periodical taking of accounts, for the ascertainment of profits and. losses not having been complete, the plaintiffs are entitled to an account from the commencement, that the good will of the business is a partnership asset in which the, plaintiffs are interested and entitled to a share and that the defendants have not complied with the plaintiffs" demand for an account and for payment of what is due.

3. The first defendant filed a written statement admitting the deeds of partnership referred to in the plaint but pleading that Tirumalasami Naidu was only a working partner who had no interest in the good will, that the interests of the first plaintiff and the other plaintiffs are adverse, that the first plaintiff has no claim to the amount due to Tirumalasami Naidu, that the accounts of the partnership were, according to the practice of the firm, settled every year, the last settlement being of the 31st December 1915, that the plaintiffs are not entitled to re-open the accounts which were taken and the correctness of which has been admitted by Tirumalasami Naidu, that, as regards the one lakh of rupees with Graham & Co., the same has been credited and brought into account in the annual taking of profits and losses that as regards the sinking fond it was a reserve against bad debts, that once in three or four year"s at settlements of accounts the sinking fund was set off against bad debts and thus the same was reduced, that the amount standing to the credit of the reserve fund on 31st December 1914 was Rs. 20,312-7-11 without making allowance for depreciation

of book and other debts and that the defendants are not liable to account on the footing of wilful default nor should accounts be taken from 1901 as alleged in the plaint. The 1st defendant admits that the amount due to Tirumalasami Naidu was about Rs. 71,717-11-9 on the 31st December 1915 and states that he was unable to pay the amount of anybody as one Govindarajulu Naidu (another brother of Tirumalasami Naidu) Objected to payment being made and claimed interest on the moneys himself.

4. The 2nd defendant filed a written statement adopting that of the 1st defendant. Defendants Nos. 3, 4 and 5 filed no written statements and did not appear at the settlement of issues or trial.

5. The following issues were settled:

1. Is the 1st plaintiff a member of an undivided joint Hindu family with the late Tirumalasami Naidu ?

2. Was not the deceased entitled to a share of the good will for the reasons seated in paragraph 9 of the written statement?

3. Are the plaintiffs barred from claiming any share in the good will of the business by reason of the settlement referred to in the written statement of the 1st defendant?

4 Are the plaintiffs entitled to account as and from 1901 or only from 1st January 1915?

5. Are plaintiffs entitled to a valuation being made of the stock in-trade and of the good will or of the former only?

6. Are the plaintiffs entitled to any share in the sum of one lakh of rupees referred to in paragraph 14 of the plaint?

7. To what relief are the plaintiffs entitled?

6. First Issue.--After some evidence was let in on this issue, it was agreed between the parties that the money which may be found due in respect of the share of the late Tirumalasami Naidu in the partnership business should be paid into Court and that it should remain in Court to the credit of this suit, and not be paid out to any of the plaintiffs until all the plaintiffs affairs majority and agree as to their rights or till the rights of the plaintiffs inter se to the money are decided by a regular suit between them. It was also agreed that the question as to whether the 1st plaintiff is entitled to any share as a member of an undivided joint Hindu family with the late Tirumalasami Naidu or whether the other plaintiffs are solely entitled to the money as the sons of Tirumalasami Naidu should be left open for determination as between the plaintiffs either by a suit or otherwise. "Leave was also given, to the plaintiffs to apply for investment of the moneys paid into Court. It is, therefore, unnecessary for me to decide the question raised by this issue.

7. Second Issue.--The plaintiffs claim that the late Tirumalasami Naiffu who was a partner in the firm is entitled to a share in the valuation of the good will. Tirumalasami Naidu was originally a broker and was for the first time taken into the partnership under the partnership deed of 1901 (Exhibit Q). The deed is between the 1st defendant, the deceased Abdul Rahiman Sahib, Muthusami Naidu, Kothandaramiah Chetty and Tirumalasami Naidu. It recites that the said five persons are desirous of carrying on business in partnership as merchants and commission agents and that they agree to the carrying on of business in partnership for five years under the name, style and firm of M.A. Hyath Batcha Sahib & Co. (M. standing for Malang, A. for Abdul Rahiman Sahib and Hyath Batcha Sahib the name of the other partner, 1st defendant). This deed was renewed in 1906 by Exhibit R, the only change in the personnel being that Kothandaramiah Chetty dropped out after executing the deed of release (Exhibit III) in favour of the other partners. The deed recites that it is to have effect from 1st January, 1906 leaving the continuing partners to carry on the business under the name, style and firm of M.A. Hyath Batcha Sahib & Co. In 1911 on the expiry of the period mentioned in Exhibit R a fresh deed (Exhibit S) was executed and it was under this deed that the partnership went on till it was dissolved by the death of Tirumalasami Naidu and two other partners (Abdul Rahiman Sahib and Muthusami Naidu).

8. The defendants, resist the claim of the plaintiffs to a share in the good will on the ground that Tirumalasami Naidu was only a working partner. This is what the 1st defendant states in paragraph 9 of his written statement. "This defendant is willing to have an account taken of the partnership assets and of the moneys standing to Tirumalasami Naidu's credit in the firm, but he denies that any of the partners other than himself and the late Abdul Rahiman Sahib are entitled to any share in the good will, in fact the name under which the firm was carried on had been in existence long before Tirumalasami Naidu was admitted into partnership and when G. Kothandarama Chetti retired from the business he made no claim for, and he was not allowed any share in, the good will thereof. This defendant further states that, amongst the class of traders to which the parties belong, working partners who are remunerated by a share of profits are not entitled to a share in the good will of the firm or to claim that the name under which the firm is carried on shall be treated as a partnership asset."

9. Mr. Ramaswami Aiyar argues that the above plea is no defence to the plaintiffs' claim to the goods, will and that even assuming that all the facts "stated in it are correct, the late Tirumalasami Naidu, who under the terms of the deeds of partnership (Exhibits Q, R and S) was a partner in the real sense of the term, being entitled, to a share of the profits and liable for the loss, was not a working partner" within the meaning of the paragraph 9 of the 1st defendant's written statement.

10. Having regard to the pleadings and frame of the issues, I do not think I can dispose of the matter on this short technical point; defendants do not anywhere

admit that their liability to share losses would make any difference so long as a person is a "working partner." The question is whether on the evidence on record the defendants have shown that Tirumalasami Naidu is not entitled to share in the good will.

11. Good will has been defined by Lord Maonaghten in *Trego v. Hunt* (1896) A.C. 7 as; the whole advantage, whatever it may be of it the refutation and connection of the form, which may have been built up by years of honest work or gained by lavish expenditure of money, and a similar view was taken in *Hill v. Ferris* (1905) 1 Ch. 466 (see judgment of Warrington, J.) Although at Ontario it was thought that good will passed by survivorship [*Hanmond v. Douglas* (1803) 5 Ves. Jun. 539], it has now been settled that in the event of the dissolution of a firm and in the absence of an agreement to the contrary, the good will must be sold to the benefit of all the partners if any of them wish for such a sale and that even in the event of a dissolution by death the good will does not go to the survivor. [*David and Mathews, In re* (1899) 1 Ch. 378. See also *Pawsey, v. Armstrong* (1881) 18 Ch. D 698 and *Lindley on Partnership*, pages 503, 507, 511 and 517].

11. There can be little doubt that under the English Law in the case of an ordinary partnership good will is part of the partnership assets in the proceeds of which the heirs of a deceased partner are entitled to a share. The question, however, is how far the English Law can be applied to partnerships in this part of the country where the system prevails of taking in what are called "working partners."

12. It is well known that in this Presidency there are peculiar kinds of partnerships where the ejman or the proprietor of the firm takes in what are called working partners for the purpose of helping him in the business. Very often these persons are old gurnastahs who, having begun as gumastahs and done good work, are rewarded by a share of the profits either in addition to, or in lieu of their salary. These partnerships consist of three classes of persons. The first, ejmans or proprietors, the second modalalis or persons who -put in moneys to be used as capital and who get a share of the profits instead of interest in return, and the third, the working Partners who are known as kashtak kultalagal (working partners) who ordinarily begin by putting in no capital, but who as the business goes on, put in the profits earned in the business itself as part of the capital and receive interest on the moneys so put in. Although every person associated in the business is called either mudalali (one who supplies capital) or working partner, the person who has a real voice in the business is the ejman and his orders have to be obeyed by the others even though they may disagree with the ejman. It is the ejman who determines the period when the accounts are to be settled and who at the settlement fixes the share that should be given to the working partners for their remuneration. The ejman, more-over, has power to dispense with the services of working partners and send them out of the partnership though this power is rarely exercised except in case of misconduct.

Haji Badruddin Sahib and K. Abdul Kadir Sahib (the witnesses called by the defendants) speak to this type of partnership, and I have little doubt that in the type of partnership which they speak of, the working partner has no interest in the good will. I have not come across a single case--either in my practice at the bar or as a Judge--where a working partner in a firm in which there are ejmans has ever got any share in the good will, I do not think they ever claimed any share in the good will till quite recently. In cases where a family business has been carried on or where a person has been doing business with his own moneys it is hardly likely "that the parties ever intended that a gumastah or a third person, brought in merely as a working partner and who may be sent out at any time, should have a share in the good will which is always treated as the exclusive property of the ejman. In such cases I have little doubt that the law as laid down in the oases cited above has no application. The presumption in such oases is that the working partner has no interest in the good will and it is for the working partner to show that by a special arrangement he became entitled to a share of the good will.

13. In cases of ordinary partnerships, however, where the terms are embodied in documents which purport to follow the ordinary laws governing the relation, between the partners, different considerations arise and in such cases every partner is prima facie entitled to an interest in the good will. In the present case the rights of the parties are regulated by three deeds of partnership (Exhibits Q, R and S). They covenant to carry on business under the name, style and firm of M.A. Hyath Batcha Sahib and Co. and in the deed of 1911 (Exhibit S) there is no distinction made as regards the powers of the partners, No special rights are reserved to any partner, and paragraph 3 expressly states that the business shall be under the management of M.A. Hyath Batcha Sahib, P. N. Muthusami Naidu and R. Tirumalasami Naidu and that in case of difference of opinion, the decision shall rest with the majority. Although in all the deeds of partnership Muthusami Naidu and Tirumalasami Naidu are called working partners, they, as working partners, have been given special powers under the deeds to override M.A. Hyath Batoha Sahib who is a capitalist partner. It also appears that though under the 1st deed of partnership (Exhibit Q) the capital was to be laid out by M. Abdul Rahiman Sahib and M. Hyath Batoha Sahib, it was contemplated that the other partners may also lay out capital and we find that so far as Tirumalasami Naidu was concerned, a considerable sum was standing to his credit in the capital account at the time when Exhibits B and S were executed. The restriction in Exhibits Q as to the clause about signing for the firm does not find a place in Exhibits R and S and reading Exhibit S, it is difficult to see how the partnership constituted by it (Exhibit S) has any similarity with the partnerships of the ejman style referred to by me above and spoken to by the two witnesses called by the defendants to prove custom. The defendants have not, in my opinion, established that this is such a case (where the deeds contain the ordinary clauses). The rules laid down in the English cases do not apply either by reason of the special nature of the partnership or by reason of anything in the course of

dealings between the parties, which suggests that the good will was treated as the exclusive property of M. Abdul Rahiman Sahib and M. Hyath Batoha Sahib.

14. I find this issue against the defendants.

15. Third Issue.--It is difficult to see how the settlement made while the business was a going concern and where there was no necessity to refer to the good will can bar the plaintiffs' rights. The purpose of these settlements pleaded by the defendants was to ascertain the state of affairs of the business with a view to appropriate the share of the profits or saddle each partner, with a share of the loss. This issue was not pressed or argued at the trial.

16. Fourth Issue.--The plaintiffs agree that the settlement of account in the lifetime of Tirumalasami Naidu should be taken as the basis on which subsequent accounts have to be taken, leave being given to them to show that any particular item was omitted in the settlements. The settlement of accounts for 1901 has been marked as Exhibit T(1), for 1905 as Exhibit T(2), for 1906 as Exhibit T(3), for 1910 as Exhibit T(4), for 1911 as Exhibit T(5), and for 31st December 1914 as Exhibit T(6). As Tirumalasami Naidu died in November 1915, the last settlement of account in his lifetime is Exhibit T(b), which takes the accounts up to 31st December 1914. The plaintiffs are prima facie not bound by the settlement made between the surviving partners or the representatives of the other deceased partners behind their back. I find on this issue that an account should be taken on the basis of the settlement of 31st December 1914, Exhibit T(6), the plaintiffs being at liberty to show that any particular item was not taken into account at that settlement.

17. Fifth Issue.--There is no dispute as to the rights of the plaintiffs to have a valuation made of the stock-in-trade on the date of the death of Tirumalasami Naidu. As regards the good will, I have already given my reasons for holding that the plaintiffs are entitled to a share in the good will.

18. Sixth Issue.--The defendants' Counsel states that the sum of one lakh of rupees was taken into account in the settlement of 1914 and this seems to be so from the books filed. The plaintiffs are in error when they state that this sum of one lakh of rupees was omitted.

19. Seventh Issue.--Though the plaintiffs claim that they are entitled to a share in the profits of the business carried on subsequent to the death of Tirumalasami Naidu, it was agreed between the parties that interest at 12 per cent. may be allowed instead of profits, on the amount that may be found to be due to Tirumalasami Naidu on the date of his death. Having regard to the extremely complicated nature of the accounts to be taken it should be sought to ascertain what the profits are that accrued subsequent to Tirumalasami Naidu's death in respect of his capital, I think the plaintiffs were well-advised in agreeing to take 12 per cent. interest instead of embarking on an enquiry which would involve a very large expenditure and costs without any certainty as to whether any profits would really accrue if an account is so taken. It is pointed out in *Hajve Siddick v.*

Mahomed Hussain (1916) 2 M.W.N. 341 that the Court has a discretion either to allow profit or to allow reasonable interest and if the parties had not agreed I would, in the interests of the minor plaintiffs, have allowed interest and would not have directed an enquiry as regards the profits.

20. As regards Government pro-notes paid into Court they were so paid on the 29th September 1916 under an order of Court, dated 19th September. I think that in taking accounts credit ought to be given to defendants for the value of the Government paper as on the 29th September 1916 and interest should cease on the sum so paid from that date. It is argued that, as money was not paid in but only Government pro notes were deposited, the Code does not apply. It appears that the plaintiffs who had notice of the application did not object and it is clear from the rules of the original side that if money had been paid in, it would have been invested in" Government pro-notes and the result would have been just the same so far as plaintiffs are concerned.

21. As regards the good will of the business, the best course would be to sell it between the parties after accounts are taken.

22. There will be a decree declaring the shares of the partners as stated in Exhibit S and directing accounts to be taken on the basis of my above findings. The Official Referee will take the usual accounts and submit his report.

23. The taxed costs of the plaintiffs and the 1st and 2nd defendants will be paid out of the partner funds.

24. Certified for 2 Counsel for defendants.