

(1963) 08 MAD CK 0037
In the Madras High Court

Raju Pillai

APPELLANT

Vs

Palanisami Pillai and Others

RESPONDENT

Date of Decision : 01-08-1963

Acts Referred:

Trusts Act, 1882 — Section 90

Citation : (1964) 1 MLJ 103

Hon'ble Judges : M. Anantanarayanan, J

Bench : Division Bench

Judgement

M. Anantanarayanan, J.—This appeal has been instituted by the plaintiff in O.S. No. 123 of 1956 on the file of the learned Subordinate Judge, Tiruchirappalli, from the judgment of Kailasam, J., in Appeal No. 93 of 1958 and the memorandum of cross-objections before the learned Judge. The background is a suit for partition filed by the plaintiff, appellant, in regard to an alleged joint family business, and the main relationship of the members are as follows : Plaintiff, the first defendant and the second defendant are brothers, and the sons of a certain person named Perisami Pillai. They formed members of a joint Hindu family whose main business was trade commenced by the grandfather of the plaintiff. We might here add that the third defendant is the widow of Periasami Pillai who died in August, 1953. Plaintiff was till recently a Station Master in Railway service, and the first defendant is now a Revenue Divisional Officer in State service. The second defendant is in the village, supervising the affairs of the family.

2. Both in the trial Court and before the learned Judge Kailasam, J., the course of the controversy centered round commission mundy business which was established and conducted from Door Nos. 61 and 62 in Mylamchandai belonging to the Begum Mosque and leased to the family. As we shall indicate later, there are subsidiary grounds of appeal by the plaintiff, appellant, but they are within a very restricted compass. Since this is the main issue between the parties, certain of the facts on this aspect have to be set forth for a proper appreciation of the

issue, and the manner in which it was dealt with by the learned Judge (Kailasam, J.).

3. We might take it as the common case between the parties that the premises comprising Door Nos. 61 and 62 Mylamchandai were leased to this joint family. That leasehold right was one possessed by the family as such, and the commission mundry business was initially a joint family business. It is equally indisputable that, after 9th July, 1954, the second defendant purported to alter the vilasam of the business into his own name, and claimed to conduct the business as his personal business, with regard to profits of which the other members of the joint family had no subsisting right. Both the trial Court and the learned Judge (Kailasam, J.) have held affirmatively in its favour as far as the joint family is concerned, with regard to certain equities and rights, even though the business might strictly be one conducted by the second defendant after 9th July, 1954, after which date the other members of the family might have no title to participate in the profits. In that respect, however, the learned Judge and the trial Court were at variance. As the learned Judge himself points out, not merely were the leasehold premises utilised by the second defendant after 9th July, 1954, but it appears as if the second defendant collected outstandings, namely moneys due to the family and utilised them for the capital of his business. The learned Judge adds " I am unable to place any reliance on the testimony of the second defendant that he used his own capital ". Further the second defendant utilised the goodwill of the business and is accountable for the value of this intangible asset, which was of service to him in the conduct of his business.... Old customers continued to patronise the shop, the nature of the business being receipt of provisions brought by the villagers to this shop, their storage, and sale of such provisions on a profit basis by the proprietor of the shop, and the disbursement by the proprietor of moneys realised by such sales to the villagers, who stocked their provisions here subject to commission being derived by the establishment. Even the old servants were employed as before, though we do not find that merely because the customers continued to patronise the shop or old subordinates were employed, the second defendant would be accountable for such employment of staff or for such sales. But, in any view of the matter and assuming that the second defendant conducted this business as his own after 9th July, 1954, up to which date he admitted that he is accountable for the profits, he would still be accountable (1) for the utilisation of the goodwill, (2) with regard to rents in respect of the premises on the basis of the original leasehold by the family and (3) for the collection of certain outstandings which were utilised by him as capital. These matters. are really not in controversy, and all that is necessary is to amend the decree in. these respects. But the learned Judge (Kailasam, J.) held, differing from the conclusion of the Court below, that the business ceased to be a joint family business after 9th July, 1954, that it was the exclusive business of the second defendant conducted by him as such, and that, subject to accountability upon the equities that we have just specified, the second defendant is not liable to share the profits of the business with the

erstwhile co-parceners after 9th July, 1954. Here certain broad aspects are not in dispute. Previously, a suit was filed by the plaintiff (O.S. No. 281 on 24th December, 1953) and that automatically brought about a severance in status between the members of the joint family. Again, on 9th July, 1954, itself the second defendant filed I.A. No. 257 of 1954, intimating that he was closing the joint family business, and that he was commencing his own business on and from 10th July, 1954.

4. It is in view of these facts primarily that the learned Judge (Kailasam, J.) came to the conclusion that, after 9th July, 1954 the profits from the business could not be shared. The learned Judge referred to the dicta of Visvanatha Sastri, J., in *Lakshmanaswami v. Sitaramamurthi* (1950) 1 M.L.J. 32 on the effects of severance, and the inapplicability of the principles of partnership law, in their entirety, to a partition of the joint family business. The learned Judge also considered the applicability of the provisions of Section 90 of the Indian Trusts Act to the facts of the present case and, after citing certain authorities that we shall have occasion to briefly discuss subsequently, came to the conclusion as we said earlier, that the profits after 9th July, 1954, could not be shared, and that the second defendant was not liable to account for such profits to the plaintiff or other erstwhile co-parceners. It is the correctness of this finding, that mainly concerns us in this appeal.

5. It is in this context that our attention has been drawn to certain somewhat intricate interlocutory proceedings that have taken place in the course of this litigation. The learned Judge (Kailasam, J.), does not appear to have interpreted the-effect of these proceedings, in their relation to the issue that he was considering, namely, the liability of the second defendant to account to the erstwhile co-parceners for the profits of the business carried on by him after 9th July, 1954. But in fact there is an intimate connection between these aspects, and we are quite unable to see how that connection could be refuted, once the plain facts are set forth. It is clear enough that the second defendant was carrying on the business at least after the litigation began between the parties, more or less with the tacit consent of the other co-parceners, and on behalf of the joint family. On 15th April, 1954 itself the Court passed orders in I.A. Nos. 37, 97 and 98 of 1954 in the applications filed by the plaintiff for the appointment of a third party as Receiver, after ousting the second defendant from the business. The effect of this order is vital for a proper appreciation of the liabilities inter se between the parties on this aspect.

The learned Subordinate Judge observed:

It will not be in the interests of any of the parties to appoint a third party Receiver and I do not see sufficient reasons for straightaway removing the second defendant from the control of the family business he had been having all the time....While it is not to the benefit of either the plaintiff or the defendants for a third party to be appointed as Receiver, I think it is desirable that there should be a proper check over the second defendant to prevent him from making

secret gains.

My order, therefore, is that the second defendant will file into Court every two weeks commencing from 3rd May, 1954, an account of all transactions of the business including the outstandings collected, the debts paid, stock kept in the shop, stock sold, expenses of the shop. It will be open to the plaintiffs who I understand are even now visiting the shop...to have a close watch over the transactions of the shop and the amounts got by way of profit....The plaintiff will have the right to peruse and go into all the accounts of the business, and to watch all the transactions of the business.

6. We do not think that there can be any doubt that this order, in effect, constituted the second defendant a Receiver of the business pendente lite on behalf of all the parties concerned in the litigation. The actual nomenclature is of little or no significance, and though the learned Subordinate Judge purported to state that he was not appointing any third party Receiver, and did not expressly state that he was appointing the second defendant Receiver as such, it is the indisputable legal consequence of his order. Subsequently, there were a series of related interlocutory applications including an application by the plaintiff for the appointment of Receiver and the application by the second defendant that we have referred to for permission to close the joint family business together with a declaration of his intention to run the business on his own account. As the learned Subordinate Judge observed, the second defendant did this without the leave of Court, and after the business had been entrusted to him virtually as Receiver of the Court. At more than one stage there were appeals to this Court. There was an order by this Court on 20th September, 1953 by which the parties agreed that the best way out of the difficulty would be to sell the entire business to the highest bidder, among the members of the family. The sale was actually held on 5th November, 1954 on which date the second defendant became the purchaser of the business in his own right (Exhibit A-9). The plaintiff filed an application for directing the second defendant to produce the balance-sheet for the period prior to the sale, and this was dismissed. There was an appeal to the High Court on this aspect and Rajagopala Ayyangar, J., dealt with the matter elaborately on the merits in C.R.P. No. 1725 of 1954 dated 21st April, 1955 and directed a second auction with regard to the receivership of the business. The suit O.S. No. 281 of 1953 was dismissed for default on 8th October, 1955.

7. The resulting consequence of these facts will be that at least up to 5th November, 1954, when the second defendant became the purchaser of the business in his own right, and irrespective of what happened subsequently, the second defendant must be held to have conducted the business only on behalf of all the parties to the suit pendente lite. He could not unilaterally, without first releasing himself from his obligation to the Court by an order of the Court, terminate his responsibility in this respect and convert the joint family business into a personal business. The inference is indisputable that, on the face of the interlocutory applications and the orders thereon, the date up to which the

second defendant is accountable is not 9th July, 1954 but 5th November, 1954.

8. Sri A.V. Narayanaswami for the respondent (second defendant) contends that since the suit O.S. No. 281 of 1953 was dismissed for default on 8th October, 1955 and the suit out of which the present proceedings have arisen was " subsequently filed, orders on the prior interlocutory applications became non est and that no rights flow there from by virtue of this final termination of their validity and effect. We are unable to concede this argument. Though it is true that the dismissal of the suit for default automatically terminates the applicability and force of the interlocutory orders then pending, this does not mean that the rights and obligations created by such situation of advantage obtained as a result of such orders, also become null and void, and are consequently not enforceable between the parties to the litigation. We have been shown no authority for such an extreme view. Nor is it in consonance with the ordinary principles of justice and the processual law.

9. We think it is sufficient to refer very briefly to the legal aspects, impinging on the liability of the second defendant. In *Kennedy v. Do Trafford* L.R. (1897) A.C. 180 the Courts were concerned with a certain property mortgaged by two persons, and held by them as tenants-in-common. Finally, there was a sale by virtue of which one of the mortgagors became the purchaser and this was impeached by a representative of the other mortgagor on the ground that the sale was to a person incapable of buying the property, as he was in a fiduciary relationship. Lord Herschell, delivering the judgment of the Court, stated : " My Lords no authority has been cited in support of such a proposition." This judgment has been cited and commented upon by Venkatasubha Rao, J., in *T. Ramaswami Aiyar Vs. T. Subramania Aiyar and Others*, where also a claim of fiduciary relationship was made. In another bench decision of this Court in *Govindarajan Pillai v. Alagappa* (1943) 1 M.L.J. 477 : ILR 1943 Mad. 418 Krishnaswami Ayyangar, J., has observed that the relationships enumerated in Section 90 of the Indian Trusts Act involve a conflict of duty and interest, which is the basic ground on which relief is to be afforded, provided of course the conditions laid down therein are satisfied.

10. Before the benefit of the section can be demanded it must be shown that the party against whom relief is sought availed himself of his fiduciary position, gained an advantage by so doing, and that the advantage was gained in derogation of the rights of the person interested in the property. The claim in the present case is that all the three criteria are satisfied, at least up to the date when the second defendant became the purchaser in his own right, in the subsequent auction directed by this Court. It seems to us to be abundantly clear that the principles of Section 90 of the Indian Trusts Act will apply ; since the second defendant had the benefit of an order virtually constituting him Receiver of Court, he was really continuing the business in derogation of the rights of the other parties pendente lite who, presumably, could equally have laid claims to the conduct of the business. The learned Judge (Kailasam, J.), has set forth at

some length, and relied upon the dicta of Shah, J. In *Culb Rao v. Babu Rao* AIR 1960 Bom. 159 regarding the principles laid down in Section 90 of the Indian Trusts Act. But it is not really necessary for us to discuss this aspect further. In our view, at least up to the date which we have specified earlier, the rights of the other co-parceners to obtain strict accounting with regard to the business could be founded upon the explicit terms of Section 90 and even upon the terms of the latter part of that section which relate to a proprietor gaining an advantage who represents all persons interested in such property. The principles of Section 94 might also conceivably apply. Hence, on this aspect the appeal will have to be allowed to the limited extent that we have indicated.

11. That really disposes of the crux of the controversy. The other matters submitted to us by Mr. K.S. Desikan for the plaintiff, appellant are quite subsidiary in character, and limited in scope. One of them relates to a credit claimed by the second defendant for discharging an alleged debt due to one Nagarathinam Pillai (Item 8(a) in Schedule D to the plaint). The facts here are of a somewhat interesting character, in the sense that the plaintiff contended that Nagarathinam was a fictitious person, and that this was merely the normal mode in which the family attempted to account for blackmarketing profits earned in the business, which could not be shown in the normal manner. We think it is sufficient to state that the learned Judge (Kailasam, J.), appears to us to be perfectly justified in his conclusion that, in the admitted state of the day-book and ledger accounts, stemming from the period when entries were made by the father himself, the debt due to Nagarathinam and discharged according to the accounts could not conceivably be held to be fictitious or unproven. The trial Court, came to this somewhat surprising conclusion, by throwing the burden upon the second defendant to examine Nagarathinam, and to prove that he was a person of flesh and blood who stood by the alleged entries in the books. We do not think that there was any such burden on the second defendant, once it is conceded that the accounts are genuine and that the entries made by the father himself in the regular course of business, providing mutual transactions between the family and Nagarathinam. We need not add that, in order to cover blackmarketing transactions in the name of mythical persons, it is not at all likely that entries characterised by mutuality would exist in the accounts. This ground of appeal has to be disallowed. With regard to item 6 of D Schedule the learned Judge has upheld the finding of the trial Court that the money advanced relating to this item was received back during the father's lifetime itself. There is an entry, as the learned Judge points out to show, that this sum of Rs. 500 was collected from one Sundaram Pillai of Pettai on 16th Adi, Vijaya. With regard to item 8-B the learned Judge has upheld the finding of the trial Court that money was advanced for the family business and that it was properly written off, as the business ended in loss, and that therefore, the second defendant was not liable to return the same. We see no reason for taking a different view. Item 38 of E (a) Schedule and items 11, 12 and 13 of E (b) Schedule relate to very small matters like a table fan, certain rice and wheat bags, etc. We agree with the

learned Judge in his view that it could not be said that the trial Court erred in its findings on these aspects. The same observations must apply to the last item relating to accounting to two sums, namely, Rs. 1,110-15-5 and 1,451-11-9.

12. In the result, therefore, the Letters Patent Appeal is partly allowed to the restricted extent that we have indicated above, both by modifying the decree in regard to matters in which the second defendant is accountable in respect of C Schedule business after the date that we have specified (5th November, 1954) and up to the date he is accountable for the business, for the profits derived from such business. Upon the other aspects urged in appeal, we see no ground for any different view, and the appeal is dismissed in those respects. As the parties have both failed and succeeded, they will bear their own costs.