

(1929) 05 CAL CK 0043
In the Calcutta High Court

Shawal Ram Dungarmal and Co.

APPELLANT

Vs

Tansukhdash Bhupatram and Co.

RESPONDENT

Date of Decision : 02-05-1929

Acts Referred:

Citation : AIR 1930 Cal 154

Hon'ble Judges : Rankin, C.J.;B.B. Ghose, J

Bench : Full Bench

Judgement

Rankin, C.J.—In this case, it appears that two firms agreed to transact business in jute jointly upon certain terms. The joint business has been referred to as the Ejmali firm and this is a more convenient designation than the style which was adopted for that business and which appears to have been changed at least once. The business began in 1320 B.S. and the findings of the learned Judge of the Court below and the evidence make the course of business in its outline reasonably clear. The defendant firm who are the appellants before us were in business at a place called Pearpur where they had godowns and where they had facilities for the purchase of jute. The plaintiff firm was a firm in Calcutta which appears to have dealt in jute and indeed in other things not only in Calcutta but at various mokams or places in different parts of the province. The jute when it was purchased was sold by the plaintiffs. The plaintiffs provided the capital for the joint concern not in the sense that they put up a certain definite amount of capital at the beginning but in the sense that they financed the joint business as and when required. The terms of the partnership between these two firms were that the plaintiffs should have 12 annas share in the profits and losses and the defendants should have 4 annas share and that the defendant firm for its work in purchasing jute and in despatching it and so on was to be entitled, to aratdari and expenses; and in this way, the business was carried on from 1320 until 1327 B.S. In 1327, whether because the business was not profitable or because of other reasons, it was agreed to close the business down and the defendant firm ceased to make any further purchase of jute. But the business was carried on for two years more, that is, until 1329 B.S. for the purpose of getting rid by sale of

the stocks of jute that had been acquired. The plaintiffs bring their suit in 1924 and they bring their suit as a partnership suit for dissolution or for a declaration that the business had been dissolved in 1329. They also ask the Court to find that in 1329 there was a settled account between themselves and the defendants according to which there was a loss in the whole course of business of some Rs. 30,000 and they ask that, on the basis of this adjustment, the defendants be directed to pay to the plaintiffs Rs. 7,000 or Rs. 8,000 as their share of the loss.

2. Now, when the plaintiffs brought their suit, they endeavoured to represent in their plaint that at Pearpur all the business of the joint concern was in the hands of the defendants and that the plaintiffs or any representative of the plaintiffs had nothing substantially to do with the business at that place or the accounts of the joint concern which were kept at that place; and the learned Subordinate Judge has found, as indeed is tolerably clear, that this endeavour on the part of the plaintiffs to put the whole burden of the accounting as regards the firm's transactions upon the defendants is entirely unsuccessful, that both the plaintiffs and the defendants worked from time to time and were constantly represented at Pearpur, that the accounts kept at Pearpur so far as the purchases of jute were concerned were based upon the books kept by the defendants and that the accounts so far as the sales were concerned were kept upon the basis of advices of sales which were sent from Calcutta by the plaintiff's to Pearpur. In these circumstances, the learned Judge had before him an ordinary partnership suit. It was extraordinary only, so far as I can gather, in the extreme prolixity of the pleadings and the apparent desire of the parties themselves to go as much as possible into the details of the account before the learned Judge instead of leaving it to its proper place after it had been decided whether the account had been settled or not, and whether a commissioner would have to take the account. In the result, the learned Judge held that the plaintiffs had failed to make out that there was an adjusted or settled account in 1329 B.S. Accordingly, he directed that the accounts of the firm should be taken before a commissioner. But he has given a direction that as regards the account up to the year 1327 B.S., the books of account at Pearpur are to be regarded as final and there is to be no liberty on the part of the defendants to challenge the accuracy of anything in the books up to that year. As regards the two concluding years of the business, the learned Judge has, in substance, directed an account to be taken in the ordinary way; that is to say, he has directed that whichever party is the accounting party in respect of a particular matter, that party will have to produce before the commissioner not merely the books which contain certain entries but any voucher or other matters which are required to support those entries. From that decision, the present appeal has been taken by the defendant firm.

3. The defendant firm complain of the directions given by the learned Subordinate Judge with reference to the years 1320 to 1327. They say that the learned Judge is not entitled to prevent their having the ordinary right of partners to have the accounts for these years taken in the ordinary way vouchers gone into and to have the accounts sifted by the commissioner.

4. The plaintiffs have also preferred a cross-objection and the main point, and indeed it is the only point, upon which their cross-objection has been argued before us is this. They say that the learned Judge was wrong in coming to the conclusion that it was not proved that there -was an adjustment in 1329 B.S.

5. I propose to consider, first, the question whether we ought to interfere with the finding of the learned Judge holding that it is not proved that the accounts were settled or adjusted in 1329. In my judgment the learned Judge's finding on that question must be supported. It appears that the person who on behalf of the defendants is said to have agreed to and taken part in making up a final settlement in 1329 is one Tularam. Tularam is evidently not a reliable witness. He represented by his evidence that he did not go to Calcutta in 1329 at all, that he went to Calcutta in 1328 and that the account which the plaintiffs said was a settled account was not made in 1329. So far, therefore, the defendants are distinctly handicapped because their witness and their man is found to be telling a story that is deliberately untrue. It is reasonably clear, for the reasons given by the learned Judge, that Tularam did go to Calcutta in 1329 and it is quite certain that, when he went on that occasion, one thing which he did was to come to a settlement as regards certain claims which the defendant firm had against the joint concern. These claims were for aratdari and export expenses and there was a question about jamadar's pay and a question about interest. There is no doubt that, at the time to which the plaintiffs point, Tularam did go to Calcutta and did settle the defendant firm's claim against the joint concern at a sum of Rs. 655 which is entered as a settled transaction in the books of the joint concern. At the same time, there comes into existence an account which purports to be an account showing the final stages of the joint concern. It is partly in the handwriting of Tularam. I understand that the entries which have relation to the question of sale are mostly in his handwriting. It is partly also in the handwriting of one Ladhuram. I think of the plain fciffl lirm. At the end of that account it is concluded by showing that there has been a heavy loss and the loss is distributed in 12 annas and 4 annas shares in the account itself prima facie showing that the defendant firm are liable for the amount now claimed by the plaintiffs. That final part of the account is not in Tularam's own handwriting. The plaintiffs say that when Tularam came to Calcutta he took part not merely in making out these figures as a form of account but that he took part in this account agreeing to it and accepting it as a final adjustment of the transactions between these two firms with the truth of which ho was satisfied. On that point, the learned Judge has found against the plaintiffs.

6. In my opinion, the learned Judge was right. It is not difficult to see that, in the circumstances, Tularam at Cal-Calcutta would be employed in trying to get out from the plaintiffs books a statement of account; but it is very different thing to say that he was given such facilities and was so satisfied with the materials before him that he got this account out as an adjusted account or that he accepted it. The evidence of the plaintiffs witnesses is that he went away promising to send the money. The first thing that one has to note is that the

burden of proof is entirely on the plaintiff's. It is no use, in a case where no one of the witnesses appears to have impressed the learned Judge, endeavouring to prove the plaintiffs' story by laying stress upon the fact that the defendants' witnesses are unreliable. The second thing that has to be observed is this that, accordingly to any reasonable practice, if accounts had been running on for some nine years and had been finally adjusted and accepted, one would suppose that an ordinary note to that effect would be made and signed by the persons who were accepting the account. It appears that the defendants and the plaintiffs had other businesses together and it appears that a mablagbundi or acceptance of the account in writing has on other occasions, been given and it is too thin to say that business in jute is a different kind of business with different customs. In my judgment, in the absence of anything in the account to show that it was accepted and signed on behalf of Tuaram, the plaintiff have a heavy burden of proof to discharge. I do not say for a moment that it may not be true that Marwaris or other people conduct their business sometimes with a considerable lack of ordinary business prudence. If they do so, they are not in as good a position on a matter of evidence as if they had not. Now, the evidence upon that question upon which the plaintiffs have to rely has been examined by the learned Judge and the first thing that he notices is that the evidence of the independent witness which, from the first has been vouched by the plaintiffs as their strong evidence of this agreement, namely, the evidence of the witness Chooni Lal Atal does not go nearly so far as the plaintiffs' case requires. He knew apparently of the settlement of the transaction about Rs. 655. His story is that:

After inspection of the account, Ladhuram Babu said that there was a total loss of Rs. 30,95 and odd in the Pearpur business and asked Toolaram to pay the defendants share of the loss i.e., Rs. 7,088 which was arrived at after deducting a sum of Rs. 655 which stood to the credit of defendants on account of press rent etc., from the fourth share of the total loss. Tularam replied that he was writing to Shawalram and Dungirmal at Pearpir and would inform after receiving letter of reply.

7. The learned Judge points out that this is very indifferent evidence to support the case made by the plaintiffs. Indeed the matter is worse when it is observed that the reason given by one at least of the plaintiffs witnesses why no signature was taken from Tularam in accepting the account is that it was quite natural and ordinary that such a thing should be done but it was not done in this instance because Tularam went away promising to pay the money. That is the evidence given by the witness Sumarmal. When we come to look at the evidence given by the plaintiffs other witnesses, it is quite true that they do, on the face of their evidence, swear that Tularam accepted the account, after being allowed to look at the Calcutta firm's books. The learned Judge, in view of the evidence of Chooni Lal and in view of the circumstances, is not prepared to accept their evidence as true or as sufficient proof that this account made out in the manner and at the time referred to was in fact, accepted by Tularam on behalf of the defendants. There is no reason at all why this Court should interfere with that

finding of fact. The learned Judge said that:

he was satisfied from the evidence that the adjustment was not completed as Ladhuram did not produce the books of the Calcutta firm for examination by Tulararam.

8. The quarrel about the plaintiffs account books appears from the evidence of Chooni Lal who was examined by the plaintiffs on commission. This witness is a debtor of the plaintiffs and shows some bias for them. He tried generally to support the plaintiffs' case. But it appears from his evidence that:

the accounts of the sales and expenses were not examined and there was a quarrel between Ludhuram and Tularam.

9. In these circumstances, it appears to me that we would depart altogether from sound practice, if we were to contemplate reversing the learned Judge's finding of fact based as it is, upon very solid grounds. I therefore, have no difficulty in saying that the cross objection on that point cannot succeed.

10. That being so, the position is that the plaintiffs' suit goes on as an ordinary suit for partnership accounts. The defendants are not suing. The plaintiffs are suing the defendants to make them liable for a sum of Rs. 7,000 or some other sum as the defendants' one-fourth share of the loss in this joint business; and the first thing to be enquired into is what is the date from which the account should commence. The ordinary principle in these matters is that unless it is shown that there has been an adjusted account at a later date, the account of the partnership will begin from the commencement of the partnership. As is put by Lindley on Partnership, Edn. 9 at p. 631:

The time from which the account is to begin will, in a general account of partnership dealings and transactions, be the commencement of the partnership unless some account has since that time been settled by the partners in which case the last settled account will be the point of departure.

11. In this case, the defendants complain that the learned Judge while nominally directing an account from 1320 to 1327 B.S. has in fact, directed no account at all because he has said that whatever is in the books of the joint concern at Peirpur is to be accepted. On that point, it appears to me that the learned Judge has not correctly directed himself as to the rights of the parties. Members of a partnership firm may have clerks and others in charge of their book-keeping and of their business in detail. Books are kept in the ordinary course and it is perfectly true that either partner may have the right to and generally will have the opportunity to inspect them. That is a very different thing from final or settled account which prevents a partner at the end of the day from having an account taken from the beginning of the partnership. In this case, the position as regards the evidence is this. The plaintiffs' witness Ladhuram says:

In 1322, 1323, 1324, and 1325 B.S., the account books of the partnership business were compared with those of the plaintiffs firm and of the defendants

firm. There was no such comparison of the account books for 1326 and 1327 B.S. because the defendants wanted 12 annas for commission and a higher rate for pressing and we did not agree to the rates wanted by them.

12. Tularam for the defendants says:

The moneys received by us from the plaintiffs' firm at any time are entered in our rokars. We entered therein the sum spent out of those moneys. They were spent for purchasing jote. Those receipts and expenditures were also entered in the books of the Ijmali partnership. They were entered simultaneously in the books of the defendants firm and of the Ijmali partnership. There were some discrepancies between the account pipers of the defendants firm and those of the partnership. But they were afterwards reconciled at the end of every year from 1320 to 1327 B.S. They were reconciled both in Pearpur and in Calcutta. They were reconciled in the presence of both the plaintiffs' and the defendants men.

13. It is to be observed further that the plaintiffs' witness Ladhuram corroborates this by saying:

The account books of the partnership and the defendants firm were not compared regularly in every year. Sometimes they were compared twice a year, sometimes after two or three years. They were compared when they were brought to Calcutta by the defendants' men.

14. There can, therefore, be no doubt that from time to time the plaintiffs did have a look to see that what the defendants were entering in the Ijmali books was correct and in accordance with the entries in the defendants' own books themselves. What seems to me very dubious indeed from this evidence is the question whether the entries put from time to time in the Ijmali books at Pearpur were ever checked or compared or reconciled with the plaintiffs' books in Calcutta and I am bound to say that I find a complete absence of any evidence that the defendants at any time were given the sales accounts of the brokers or other immediate materials for examining or checking the actual transactions of the plaintiffs in the matter of sale. That being the position as regards the trouble taken during these years with the books that were kept at Pearpur, I come to notice the way in which the learned Judge has dealt with this matter, he says:

The evidence on the plaintiffs' side shows that during the whole of this period.

that is, until 1327:

the accounts of the partnership were written both by the plaintiffs' men and the defendants' men and under the supervision of each other. The books were kept in the defendants' premises at Pearpur and both parties had access to them and handled them. It also appears from Tularam's evidence that the transactions relating to the purchases were all entered in the books of the defendants' own firm and thence in the books of the joint firm and that the transactions relating to sales were entered in the books from the advices that were sent from Calcutta by the plaintiffs' firm... Tularam further deposes that there was periodical

comparison of the items in tin books of the joint firm with those in tin defendants' firm and the plaintiffs' firm and discrepancies detected were reconciled.

15. I pause here to observe that the learned Judge is taking Tularam's evidence further than it goes because Tularam does not say that there was a comparison between the books at Pearpur and the books of the plaintiff firm at Calcutta. He says that these books were reconciled with the defendants' books at the time they were taken. The learned Judge, thereupon, concludes that:

all the items in the books from 1320 to 1327 B.S. were accepted by both parties. If there were any improper charges or omissions so long acquiesced in, they must be regarded as having been made by agreement. Therefore, so far as the items of transaction in the account books of 1320 to 1327 B.S. are concerned, there should be no investigation about their correctness in the present suit.

16. I can only say that it appears to me that the learned Judge has misapplied the principles which are to be applied in a partnership suit for account. The principle that is to be applied is not that the books have been there all the time, any party can inspect them, they are not to be examined at all; but the principle to be applied is that, unless there has been a settled account, the account is to be taken from the commencement of the business. It is quite true that, where owing to the lapse of time materials or vouchers for checking the entries in the partnership books have been lost or are no longer available, it is open to the Court to give special directions that, for certain purposes, certain matters shall be proved by a particular kind of evidence.

17. In partnership cases where all partners have an opportunity of examining the books, it needs no special direction to make the books of the firm prima facie evidence. But, in the present case, if the fact be that the sales were done by the Calcutta firm of the plaintiffs, that the books at Pearpur were entered up upon advices sent from Calcutta and that the defendants never had an opportunity of checking the account of sales of brokers or otherwise going into the truth and accuracy of the advices sent from Calcutta, it seems to me that the accounts must be taken in the ordinary way. No doubt, if these accounts of sales were entirely unavailable, then there might be need for some special directions. But as a matter of fact, the defendants in this case called a witness from the brokers who produced the accounts, contract notes and so on; and the learned Judge when they tendered the delivery book said that it was not required at the present moment and could be used before the commissioner. When I look into this matter, it seems to me that there is no need whatever to make any difference between the years 1320 to 1327 B.S. and the two following years, The learned Judge has gone into the various objections to the accounts taken, in the defendants' written statement and he has given general directions as regards the two remaining years showing to the commissioner the general extent and scope of his duty in view of the defendants' objections. It appears to me that what is required is to let it be understood that the account is to be taken in the

same way throughout and that the commissioner is to deal with the years 1320 to 1327 B.S. exactly on the same lines as he has been directed to follow in connexion with the two later years. In my judgment, there is at present before us no reason for any special direction. I have no doubt at all that the commissioner will be a competent man. There is no question of the plaintiffs' Calcutta books not being available or the defendants' Pearpur books not being available. There is no question of the evidence from the brokers not being available. In my judgment, there is no need for us to make any order except that the whole period is to be dealt with by the commissioner in the ordinary manner and there will be no exception with regard to the years 1320 to 1327 B.S. In this view, the appeal will be allowed with costs and the cross-objection must be dismissed with costs. In the cross-objection, we assess the hearing fee at five gold mohurs.

B.B. Ghose, J.

18. I agree.