

(1971) 03 MAD CK 0054
In the Madras High Court

V.S. Kothandapani Naidu

APPELLANT

Vs

P. Venkatachala Gounder and Others

RESPONDENT

Date of Decision : 11-03-1971

Acts Referred:

Income Tax Act, 1922 — Section 26A

Citation : (1971) 84 LW 685 : (1972) 1 MLJ 311

Hon'ble Judges : V. Ramaswami, J

Bench : Division Bench

Judgement

V. Ramaswami, J.—The plaintiff is the appellant. He filed O.S. No. 99 of 1960 on the file of the learned Subordinate Judge of Cuddalore praying for a preliminary decree for taking accounts of a dissolved partnership, to appoint a duly qualified auditor as Commissioner to take charge of the accounts, and to pass a decree in favour of the plaintiff for the amount found due to him, or in the alternative to pass a decree in favour of the plaintiff for the amounts advanced by him to the defendants for the business with interest at 6 per cent per annum from the date of plaint and for costs.

2. The plaintiff's case was this. The plaintiff is a landlord residing in Uyyakondravi Village. Defendants 1 and 2 were his close friends. They were doing jewellery mart and shroff business at Vridhachalam. The 3rd defendant is the undivided brother of the 1st defendant. The 4th defendant is the undivided brother's son of the 2nd defendant. The 2nd defendant is the son-in-law of the 1st defendant.

3. About the end of 1956 defendants 1 and 2 persuaded the plaintiff to agree to commence and conduct a lorry service business and motor workshop in partnership with them, each of them contributing an initial capital of Rs. 25,000. Defendants 1 and 2 further represented that they would themselves conduct and manage the business and maintain regular accounts, and pay the plaintiff one third share of the profits of the business. The plaintiff agreed to enter into the partnership and paid Rs. 26,500 in three instalments as his contribution of the

initial capital as required by the defendants 1 and 2. The plaintiff is not aware whether the defendants 1 and 2 also contributed the same initial capital. He trusted defendants 1 and 2 so much that he did not acquaint himself as to how the business was being conducted. At the commencement of the lorry service, four lorries were purchased from "Sri Kamakshiamman Bus Service", Vridhachalam for the partnership. As defendants 1 and 2 were each having independent jewellery mart shop and shroff business at Vridhachalam in their names, they had one lorry registered in the name of the third defendant (brother of the 1st defendant two lorries in the name of the 4th defendant (brother's son of the 2nd defendant) and one lorry in the name of the plaintiff. Though the lorries were thus registered in the names of the 3rd and 4th defendants and the plaintiff, they really belonged to and were the assets of the said partnership firm. For the same reason the accounts of the business were maintained under Vilasam of S.K.K. representing the initials of persons in whose names the lorries had been registered.

4. The lorry service and the motor workshop were commenced on 1st January, 1957 and as stated supra the 1st defendant was managing the said partnership business. Account books were maintained by him. Written by the clerk appointed by him therefore and by a clerk employed in his own jewellery mart. Lorries were put on service on 1st January, 1957. This went on till 15th February, 1958.

5. On 15th February, 1958, the 2nd defendant took over the management and control of the lorry service business and motor workshop and changed the name into "Rajendran" and "Dhanalakshmi" Motor Workshop respectively, "Rajendran" being his son's name and "Dhanalakshmi Motor Workshop" being derived from his jewellery mart "Dhanalakshmi Jewellery Mart". The name "Dhanalakshmi Motor Works" was subsequently changed into "Mani Motor Works". The 2nd defendant was conducting the partnership business and maintaining the accounts of the partnership. He was in management of the two businesses till about 30th September, 1958. The plaintiff did not know anything about the nature and extent of the earnings in the lorry business, nor did he draw any amount, nor did he look into the accounts of the business. He bona fide believed that the defendants were conducting and managing the business properly and to the benefit of all the parties. As the plaintiff was not paid any amount by way of profits as and for his share in the partnership business and as the defendants were giving evasive answers, when the plaintiff called upon them to render an account, misunderstanding arose between the plaintiff and the defendant and the matter was then orally referred to the decision of a panchayat consisting of P.Ws. 4, 5, 6 and 10. As agreed to by the parties before the panchayatdars the partnership was dissolved on and from 1st October, 1958 and the four lorries belonging to the partnership were auctioned. The plaintiff purchased one lorry and the workshop. The defendants purchased in the name of the 4th defendant the remaining three lorries. The Panchayatdars requested the defendants to produce the accounts. The 2nd defendant produced only some of the account books and files of the partnership but not the complete set of accounts. The

plaintiff repeatedly asked the defendants to produce all the account books before the panchayatdars and to pay the amounts due to him on taking accounts, but the defendants evaded doing so. Hence he has filed the suit praying for the reliefs set out above.

6. The defendants filed separate written statements. The 1st and 2nd defendants denied that they were partners in the suit partnership and stated that they never managed the suit partnership. The 3rd defendant pleaded that a partnership was formed by the plaintiff, the 4th defendant and himself, that the 1st defendant as manager of the 3rd defendant and as his elder brother asked the 3rd defendant to join with the plaintiff and the 4th defendant in the partnership, that the 1st defendant advanced the necessary capital therefore and that he continued to be a partner only till 31st May, 1958. He further contended that the partnership of defendants 3 and 4 and the plaintiff functioned from 1st January, 1957 to 31st March, 1958, that differences arose and the 3rd defendant left the partnership and a fresh partnership was run between only the 4th defendant and the plaintiff. He also claimed certain amounts as due to him from the partnership as and by way of his share of the profit.

7. The 4th defendant filed a written statement supporting the claim of the plaintiff and admitting that the allegations in the plaint were true. He stated that the partnership was originally started between the plaintiff as one party, defendants 1 and 3 as the second party and defendants 2 and 4 as the third party, that one share capital was contributed in the name of the 3rd defendant but the joint family of defendants 1 and 3 was the real partner, that similarly the joint family of defendants 2 and 4 was the real partner but the contribution of capital was made in the name of the 4th defendant. It was his further case that the 2nd defendant alone Was in possession of the accounts.

8. The 1st defendant filed an additional written statement on 24th September, 1960, alleging that, since the lorries were not registered in the names of the partners, the partnership was illegal under the Motor Vehicles Act and that therefore the plaintiff cannot sue for taking accounts of an illegal partnership. A similar contention was raised by the 2nd defendant also. The 2nd defendant also filed an additional Written statement controverting the main allegations in the 4th defendant's Written statement and stating that all his properties were his self-acquisitions and that he had nothing to do with the suit partnership.

9. The plaintiff also filed a reply statement and also amended the plaint contending that the suit partnership was not illegal and that he Was entitled to a decree as prayed for.

10. The learned Subordinate Judge framed as many as 17 issues and came to the conclusion that defendants 1 and 2 Were the real partners of the suit business along with the plaintiff, that defendants 3 and 4 respectively were name lenders for defendants 1 and 2, that the 3rd defendant did not leave the partnership on 31st March, 1958, as contended by him, that the 2nd defendant

was in actual management and possession of the suit partnership accounts on 1st October, 1958 and that the suit partnership was dissolved on 1st October, 1958. But he held relying on the decision reported in *Varadarajalu Naidu v. Thavasi Nadar* (1963) 2 M.L.J. 20 and some earlier decisions that the suit partnership was illegal and hence the suit itself was not maintainable. He further held that the plaintiff was not entitled even to the return of the sums advanced by him. On the alternative relief he gave a finding that, if the plaintiff were in law entitled to recover the original contribution, the suit was in time. He, accordingly, dismissed the suit and the claim of the 3rd defendant with costs.

11. Learned Counsel for the appellant contends that the view of the trial Court that the suit was not maintainable on the ground that the suit partnership was illegal is not correct and that the decision of this Court in *Varadarajalu Naidu v. Thavasi Nadar* (1963) 2 M.L.J. 20, relied on by the trial Court in support of its view has since been overruled by the Supreme Court in *Viswanathan v. Shanmugham* (1969) 1 S.C.J. 706 : (1969) 1 M.L.J. 86 : (1969) 1 A.W.R. 86 : AIR 1962 S.C. 493. The defendants pleaded that, since for one lorry the permit was in the name of the plaintiff, for another lorry in the name of the 3rd defendant and for two other lorries in the name of the 4th defendant, and since the permits were not in the names of all the partners, even if defendants 1, 3 and 4 were partners, the partnership was illegal, and alternatively, that if defendants 1 and 2 are considered to be partners as claimed by the plaintiff, since the permits were not in the name of the partnership and some of them were in the names of defendants 3 and 4, who were not the real partners, the partnership was illegal and that therefore the suit was not maintainable. The Supreme Court in *Viswanathan v. Shanmugham* (1969) 1 S.C.J. 706 : (1969) 1 M.L.J. 86 : (1969) 1 A.W.R. 86 : AIR 1962 S.C. 493 which is an appeal from the decision of this Court in *Viswanathan v. Shanmugham* ILR (1960) 2 Mad. 477 : (1966) 1 M.L.J. 363 held that there was nothing in the Motor Vehicles Act, which expressly or by implication bars benami transactions or persons owning buses benami and applying for permits on that basis. They expressly overruled the decisions in *Vyavan Chettiar Chatram by Hereditary Trustee, D. Shanmuga Raja Vs. The Board of Revenue by the Commissioner of Settlements of Estates*, . The learned Counsel for the 1st respondent tried to distinguish this judgment on the ground that it related to a contract carriage and not a lorry which is a public carrier. It would be seen that some of the decisions relied on by the Courts for their view in the decisions in *Vyavan Chettiar Chatram by Hereditary Trustee, D. Shanmuga Raja Vs. The Board of Revenue by the Commissioner of Settlements of Estates*, and *Viswanathan v. Shanmugham* ILR (1966) Mad. 477 : (1966) 1 M.L.J. 363, which were overruled, related to carrying on trade in lorry for which permit was issued in the name of one of the partners alone. In *T.K.P.R. Ramanatha Chettiar and Bros., Chandra Lorry Service Vs. Commissioner of Income Tax*, a Division Bench of this Court held that the principle of the judgment of the Supreme Court above referred to would be clearly applicable where the firm was the owner of lorries and operating them and that the

partnership could not be regarded as illegal, merely because the permits in regard to them stood in the names of third parties. We are therefore clearly of the view that the suit partnership was not illegal and that the suit was maintainable. We accordingly reverse the finding of the lower Court on this aspect.

12. Learned Counsel for the 1st and 2nd respondents wanted to support the decree of dismissal of the suit challenging the finding of the trial Court that the 1st and 2nd respondents were the real partners and that the 3rd and 4th respondents, were mere, namelenders. We may at once state that the findings of the Court below on these issues are based on a volume of documentary and oral evidence. We do not consider it necessary to deal in detail with the entire documentary evidence as we are confirming the findings of the Court below. We will discuss only a few of the relevant documents and the relevant portions of the oral evidence on this aspect. The documents, which go to prove that the 1st defendant was a partner, may be considered first. Exhibit A-8 is a letter which purports to have been written by the 1st defendant to the plaintiff and. signed by Muruganandam Chettiar employed under the 1st defendant at the relevant time. This deals with the partnership business in lorries. In this letter the 1st defendant asks the plaintiff to bring Rs. 5,000 and gives the details of the expenses. Exhibit A-9 is another slip of paper purported to have been written by the 1st defendant from. Vridhachalam to the plaintiff stating that Rs. 239-14-9 had been sent by the" 1st defendant to the plaintiff as per the request of the plaintiff and saying that the 1st defendant would send the lorry that evening for the last load to the village of the plaintiff. This letter also-had been signed by Muruganandam on. behalf of the 1st defendant. Exhibit A-15 is another letter purporting to be written by the 1st defendant to the plaintiff regarding MSY 7399 which had been purchased from P.W. 1'S brother. This letter also had been signed by Muruganandam. There could be very little doubt that this letter taken along, with Exhibit A-8, whose contents were admitted by the 1st defendant to be correct, was written on behalf of the 1st defendant. These Exhibits A-8, A-9 and. A-15 were produced into Court by P.W 10 as among the documents given by the 2nd defendant on the night of 1st October, 1958.

13. Exhibit A-32 is an unregistered, lease deed dated 20th February, 1957, entered into between the 1st defendant and one Sheik Nanna Sahib regarding, a site on which the workshop had been, put up. The 1st defendant had paid rent in pursuance of this deed to the lessor. P.W. 3, a clerk of the lessor, speaks to the execution of the lease deed by the 1st defendant and also the payment of rent by him. Exhibit A-32 recites that the site was taken on rent for putting up a shed for stationing lorries belonging to the 1st defendant. It may be mentioned that the 1st defendant had no lorries at that time excepting the partnership lorries. It is clear, therefore, that Exhibit A-2 was taken by the 1st defendant for stationing the lorries of the suit partnership. The 1st defendant also took on lease the superstructure on the adjoining site from one Chockalingam Pillai for the partnership business. In a suit filed by Kesava Chetty, the owner of the site,

against Chockalingam Pillai and the 1st defendant, the 1st defendant filed a written statement contending that Kesava Chetty had orally agreed to have the 1st defendant as a tenant for one year. The suit was decreed for a sum of Rs. 260 towards rent and that amount was paid by the partnership, and the expenses of defending the suit were also met by the partnership. We have also the evidence of payment of rent by the 1st defendant to Kesava Chetty on 1st July, 1957, under Exhibit A-50. It is admitted that this superstructure was used for the partnership business.

14. The other set of evidence relates to the purchase of petrol from the petrol bunk of Mr. A.R. Damodara Mudaliar and Company, Cuddalore. The ledger page in the accounts of the petrol bunk is in the name of the 1st defendant. But it is seen from the accounts produced by the petrol bunk that some of the amounts debited in that ledger page are for the petrol supplied to the partnership lorries. The application for telephone in the workshop was also made by the 1st defendant. Exhibit A-63 is a post-card written to the 1st defendant by a firm called the Indo-Cochin Tyres at Tiruchirapalli for supplies of Firestone Tyres. The 1st defendant had no lorry of his own then. Therefore, the tyres that were supplied by the Indo-Cochin Tyres at Tiruchirapalli were for partnership lorries. The partnership account books also show various entries of expenses incurred by the 1st defendant for partnership business. In the 1st defendant's ledger, Exhibit B-36 at page 73, which is in the handwriting of Muruganandam, a sum of Rs. 9,000 had been debited against the plaintiff on 9th October, 1957. The same amount had been credited in the day book Exhibit 39 of the suit partnership at page 145. There are other entries of similar nature. The learned Subordinate Judge of Cuddalore had dealt with the criticisms advanced by the 1st defendant's Counsel in respect of these documents. We entirely agree with the learned Subordinate Judge that these criticisms are not valid and tenable.

15. The documents, which go to show that the 2nd defendant also was a partner may be considered now. Exhibit A-2 dated 24th April, 1958, is a letter by P.W. 1 to the 2nd defendant requesting him to come to Madras for the purpose of purchasing a lorry. Exhibit A-3 dated 25th April, 1958, is the reply by the 2nd defendant to P.W. 1. He had stated therein that he had received Exhibit A-2 and that the plaintiff had also informed about it. It contains also other detailed particulars. Exhibit A-5 is another letter by P.W. 1 to the 2nd defendant, in which he had stated that a P-6 diesel engine with all parts was available at Madras for a price of Rs. 4,500 and that, if it was needed, the 2nd defendant might start and come there with money or send telegraph. The 2nd defendant sent a telegram to P.W. 1 in reply to Exhibit A-5 stating that the plaintiff would be coming with the money. The expenses for the telegram had also been entered in Exhibit B-5, the day book of the partnership. It may also be mentioned that the 2nd defendant never had any lorry and therefore those letters related to the purchase of a lorry for the partnership business. These letters Exhibits A-2 to A-5 were produced by P.W. 10 along with other documents as given to him by the 2nd defendant on the night of 1st October, 1958. P.Ws. 1 and 2 speak to these letters and their

contents. We have no doubt that P Ws. 1 and 2 speak the truth and we accept their evidence.

16. Exhibit A-56 is a notice issued by the Assistant Inspector of Labour, Vridhachalam to the 2nd defendant intimating him that certain registers of the workshop were not properly maintained or produced for inspection as required under the Madras Shops and Establishments Act and that repetition of such art offence would result in prosecution. Exhibit A-7 is an invoice issued by the Indian Roadways for despatch of four lorry tyres by P.W. 1 to the 2nd defendant. Exhibits A-16 to A-18 are copies of letters Written by the 2nd defendant to the plaintiff. Though the trial Court found that the original of these letters were genuine, it did not take them into consideration in deciding the issue. We consider that the reasonings of the learned Subordinate Judge for not taking these letters into account are unsound. It could not by any stretch of imagination be considered that the plaintiff himself would have removed the originals from the Court. They were all documents supporting the plaintiff's case and there was no reason why the plaintiff should remove them from Court. Further, in the counter-affidavit filed in I.A. No. 1176 of 1961 the 2nd defendant did not challenge the authenticity or genuineness of these documents, but only contended that these letters had no connection or bearing with the suit.

17. The 2nd defendant had paid a sum of Rs. 1,442-8-0 to S.V.O.C. Petrol bunk towards the cost of petrol on 15th July, 1958. The fact that the 2nd defendant paid heavy sums to the petrol bunk for petrol supplied to the lorries of S.K.K. Lorry Transport would undoubtedly show that the 2nd defendant was also a partner of the suit partnership. Even if we do not take into account Exhibits A-16 to A-18, the documents above considered and the other documents considered by the learned Subordinate Judge clearly establish that the 2nd defendant also was a partner in the suit partnership.

18. The plaintiff as P.W. 2, P.W. 1, P.Ws. 4 to 6 and P.W. 10 stated that the 1st and 2nd defendants were the partners with the plaintiff. We have no reason to disbelieve their evidence. The only criticism that has been advanced against P.W. 1's evidence is that he is the cousin of Muruganandam, who is not now in service. P.W. 4 is a signatory to the auction lists, Exhibits A-10 to A-14, and was admittedly a panchayatdar. Nothing has been said to discredit his evidence. P.W. 5 knows the parties for over 15 years. He was also a panchayatdar. The only suggestion put to him is that he is related to P.W. 10 and that he was deposing falsely at the instigation of P.W. 10 and that of the plaintiff, for which there is hardly any basis. P.W. 6 is a richman. He was also a friend of both the 1st and 2nd defendants. He had produced the letters written by the 1st and 2nd defendants, Exhibits A-34 to A-37, and he was also one of the panchayatdars. P.W. 10 is an advocate and an ex-M.L.A. He resides in the next house to that of the second defendant. He was also the 2nd defendant's Advocate. The enmity pleaded "against P.W. 10 is an afterthought. Apprehending that he would be a material witness in the suit the defendants have issued a notice, Exhibit B-27

long after his reporting settlement out of Court in S.C.S. No. 191 of 1960. The lower Court has rightly rejected this theory of enmity.

19. Thus the oral evidence and the documents clearly establish that the 1st and 2nd defendants were the real partners and that the 3rd and 4th defendants were mere namelenders. Learned Counsel for the 1st defendant contended that there is no such thing as benami partnership known to law and actually it is inconsistent with one of the main principles of partnership, namely, that one partner is an agent of the other partners. We are not able to follow this argument. What we have found is that the 1st and 2nd defendants were the real partners along with the plaintiff. Once we come to the conclusion that the partnership consisted of the plaintiff and the 1st and 2nd defendants how the principles of partnership could not be applied to them is not understandable. The 3rd and 4th defendants were never partners on our finding that the 1st and 2nd defendants were the real partners. It has been held in *Dr. S. Muniswami Naidu and Others Vs. G. Thandavaraya Mudaliar*, that where a contract was signed by one person only the evidence to show that another was also a party to such arrangement or was bound by it was admissible. In *Nurul Hasan Vs. Amir Hasan and Others*, it was held that it could not be contended that business could not be carried in benami with a third party, that the share in the partnership was a property and that the ostensible partner might very well be not the real partner but only a benamidar of the real partner. In *K.M. Viswanatha Pillai Vs. K.M. Shanmugam Pillai*, it was held:

In India benami transactions are recognised and not frowned upon. See 23 CWN 521 (Privy Council). In *Commissioner of Income Tax, Gujarat Vs. A. Abdul Rahim and Co.*, it was held by this Court that the registration of the partnership deed u/s 26-A of the Indian Income Tax Act, 1922 could not be refused on the ground that K was the benamidar of V.

Therefore, there is no substance in this argument of the learned Counsel for the respondents.

20. The Court below having found that the 1st and 2nd defendants were the real partners and that the 1st defendant was writing letters and taking an active part in the beginning of the partnership, held that the 2nd defendant was in actual management on 1st October, 1958. We are of the view that both the 1st and 2nd defendants were in management of the partnership business for the reasons, which persuaded us to hold that the 1st and 2nd defendants were the real partners. We, therefore modify the finding of the trial Court on this aspect.

No other point has been argued in the appeal.

21. In the result we allow the appeal with costs. There will accordingly, be a preliminary decree for taking of accounts of the dissolved suit partnership.