Privy Council Appeal No. 66 *of* 1936

Lala Nand Kishore, since deceased, (now represented by Madan Mohan Lal minor, under the guardianship of Musammat Kalawati) - - - - - - - - *Appellant*

v.

Azmat Ulla Official Receiver, Delhi, and another - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1938

Present at the Hearing:

LORD WRIGHT
LORD ROMER
LORD PORTER
SIR GEORGE RANKIN

[*Delivered by* LORD ROMER]

This is an appeal from a decree of the High Court of Judicature at Lahore dated the 16th November, 1933, setting aside a decree of the Senior Subordinate Judge at Delhi dated the 5th August, 1929, in an action in which one Lala Shibba Mal (since deceased and now represented by the appellant) was the plaintiff and the second respondent, Rai Sahib Rup Narain, was originally the sole defendant. The defendant having become insolvent, the first respondent, the Official Receiver, Delhi, was added as a party to the suit. The short question to be determined is whether a sum of Rs.1,66,570 that admittedly became due from the second respondent to Lala Shibba Mal constitutes, as was held by the Subordinate Judge, a charge upon the interest of that respondent in certain land at Delhi hereinafter referred to or whether, as was held by the High Court, the sum is merely an unsecured debt. The facts giving rise to the appeal are as follows.

On the 24th November, 1921, the said Rup Narain, therein called the first party, and the said Shibba Mal, therein called the second party, entered into a deed of partnership. As the question in dispute is principally one as to the true construction of that document, it is necessary to consider its provisions in some detail. It begins by a declaration made by the parties to the effect that both the parties had jointly purchased two blocks of property situate in Delhi City near Barh Shahbulla by means of a sale deed, and continues as follows:—

"Therefore they will abide by the following terms:

"1. In the sale-deed in respect of the property the name of the second party has been entered as the vendee. But as a matter of fact the first party is the purchaser of three-fourths share, while the second party is the purchaser of one-fourth out of the two blocks mentioned above.

"2. The first party has paid Rs.25,000, and the second party rupees one lac on account of the sale price.

"3. Both the blocks of the property have been purchased for Rs.1,25,000. The first party shall pay interest to the second party at the rate of Re.0-14-0 (annas fourteen) per cent. per mensem on Rs.68,750 inasmuch as the latter has invested Rs.68,750 for the former."

Now as will appear from later clauses in the deed the object of the partnership was to turn the two blocks of property to profitable account either by letting them to tenants or by selling them, and in later clauses of the deed there are provisions such as are commonly found in articles of partnership relating to the management of the partnership property, and the proportions in which the profits and losses were to be shared by the partners. But it is plain that the three clauses above set out are not in strictness terms of the partnership at all. They are rather in the nature of recitals as to the ownership of the properties that are being brought into the partnership by means of which the partnership profits are to be earned, and of provisions as to the financial adjustments to be made between the owners in consequence of the fact that the second party had paid more than his proper share of the purchase money. The excess, therefore, of the lac of rupees which he had paid over Rs.31,250 (which was his proper share) amounting to Rs.68,750 was rightly treated as having been invested by him for the first party. It was in effect a loan by him to the first party without security, and the loan was to bear interest at the rate mentioned in clause 3. The circumstances of the case, no less than the language of these clauses, are quite inconsistent with the idea that the Rs.68,750 was a loan made by the second party to the partnership. Had it been so it could not possibly have been described as an investment for the first party, and the liability to pay interest on it would not have been imposed on the first party, but on the partnership itself.

The next two clauses, however, seem to be true partnership clauses. They are as follows:—

"4. The first party shall be the owner of three-fourths share while the second party shall be the owner of one-fourth share, out of the entire income of the property.

"5. Deeds of rent to be secured from tenants shall be in favour of both the parties. Tenants shall be located and dislocated with the consent and consultation of both the parties."

But then comes a clause concerning which it is more difficult to determine whether it is one relating to the conduct of the partnership business or one relating to something to be done to the property as a preliminary to such business being entered upon. It is in these terms:—

"6. Both the blocks of the property are in a rotten condition. Hence the first party shall pay Rs.20 (rupees twenty) per cent. and the second party Rs.80 (rupees eighty) per cent. towards

> total cost of construction thereof. The second party shall not get interest on its one-fourth share of the cost of construction, while the first party shall be liable to pay the amount of its own share together with interest at the rate of Re.0-14-0 (annas fourteen) per cent. per mensem. The second party shall pay one-fourth of the amount spent. The second party shall continue charging interest at the above rate on the surplus amount spent by that party for the first party. For instance, if Rs.100 are spent, the first party shall pay Rs.20 (rupees twenty) and the second party shall charge interest on Rs.55 (rupees fifty-five) from the first party leaving Rs.25 (rupees twenty-five) without interest out of the remaining sum of Rs.80 (rupees eighty)."

The reconstruction of the premises might well have been made a partnership affair and the cost might well have been provided for by advances made by the parties to the partnership. But in that case interest on the money advanced by the second party in excess of one-fourth of the cost would be paid to him by the partnership, i.e., out of the partnership funds before any division of the partnership profits, and not, as is provided by the clause, by the first party personally. Nor could such excess have possibly been described as being spent by the second party for the first party. It would have been spent for the partnership. Their Lordships are accordingly of opinion that clause 6 must be treated as a clause that was intended not to govern the relationship between the parties as co-partners, but the relationship between them as co-owners of a property that was after reconstruction to be the subject matter of the partnership. In other words, their Lordships are of opinion that any sum paid by the second party towards the cost of reconstruction in excess of his quarter share is to be treated as a loan made by him to the first party individually and not as a loan made to the partnership. This view is corroborated to some small extent by a consideration of clauses 7 and 8. For clause 7 provides that the work and the management of construction shall be carried on with the consent and the consultation of both parties, whereas clause 8, which seems to be addressed to the period after the construction has been completed, says this:—

> "8. The first party resides in Delhi. Hence the said party shall manage the entire affairs connected with the property get necessary repairs effected thereto and keep a regular account thereof and render the same monthly."

Further confirmation of the view is to be found in clauses 9 and 10 which regulate the partnership dealings in the alternative cases of the property being retained as an income producing concern, and of the property being sold at a profit. Both clauses in terms deal only with the property after reconstruction.

On the 6th June, 1924, a supplemental deed of partnership was entered into by the parties. It provided for the bringing into the partnership of an additional plot of land to which the parties were entitled in the same proportions as before, but does not otherwise materially affect the position. It does, however, once more refer to the interest on the sums paid by the second party in excess of his quarter share whether in connection with the original purchase or in connection with the reconstruction of the properties as

interest which is chargeable from the first party and which the first party is bound to pay to the second party.

The reconstruction of the buildings proceeded and the plaintiff Shibba Mal paid into Rup Narain's account sums amounting, as he alleged, to some Rs.43,000 towards the cost thereof. But he was unable to obtain from Rup Narain repayment of either the Rs.68,750 and interest thereon mentioned in the deed of partnership or the excess of the Rs.43,000 over his quarter share of the cost of the reconstruction. Nor, as he alleged, could he even obtain from Rup Narain any satisfactory account of the way in which the Rs.43,000 had been expended. Accordingly on the 6th January, 1926, he instituted the present suit against Rup Narain praying for a decree against the defendant for Rs.90,750, being the Rs.68,750 with accrued interest amounting to Rs.22,000, and also an account of Rup Narain's dealings with the moneys paid by the plaintiff towards the expenses of the rebuilding and payment by the defendant with interest of the amount found due to the plaintiff on taking such account. It is interesting to observe that this was in no sense a partnership action. It neither claimed a dissolution and winding up of the partnership nor the taking of any partnership accounts. It was an action against the defendant in his personal capacity, and sought to make him and not the partnership assets liable for repayment of the sums alleged to be due. It was indeed alleged by the plaintiff in his petition of plaint that both the Rs.68,750 and the Rs.43,000 had been paid into the account of the defendant, and not into the partnership account. He did, however, contend that the defendant's share in the property was " hypothecated with the plaintiff till the amount due is paid off which forms a charge thereon ". The defendant in his written statement raised various defences of which it is only necessary to refer to two. He alleged that the suit was not maintainable unless the plaintiff asked for a dissolution of the partnership and he denied that any sums due to the plaintiff constituted a charge upon his share in the property at Delhi. He also alleged that one Gopi Nath had with the consent of both parties been appointed to keep accounts of the expenses of the rebuilding operations. It would seem from this written statement that the defendant was endeavouring to maintain that the sums advanced by the plaintiff were advanced to the partnership and not to the defendant personally. He does not appear to have observed that if this were true the sums were in effect charged upon the property. For in the winding up of the partnership the property would have to be sold and loans made by a partner to the partnership would after payment of other creditors be applied in repayment of such loans. If on the other hand, as the plaintiff seemed to be contending, the advances were made to the defendant personally, they would not in the absence of express agreement, and admittedly there was none, be so charged at all.

By the time the case came on for hearing before the Subordinate Judge the position had altered to some extent.

The defendant had become insolvent, and the Official Receiver had been added as a party. The parties, moreover, had agreed upon a dissolution of the partnership, the property at Delhi being retained in specie by the parties as to three-fourths by the defendant, and as to one-fourth by the plaintiff. The accounts kept by Gopi Nath had been agreed between the parties and the amount shown by those accounts to be due to the plaintiff was Rs.1,66,570. Their Lordships have not been supplied with a copy of those accounts, and they do not, therefore, know how the balance found due to the plaintiff was arrived at. But it does not appear that any profits ever accrued to the partnership from lettings of the property, and there were no outside creditors to be dealt with. It may therefore be assumed that the balance in question was entirely composed of the Rs.68,750 and the excess contributed by the plaintiff to the rebuilding operations over his own one-fourth share, together with accrued interest on those sums. In these circumstances the only question to be decided at the hearing was whether these sums were to be treated as having been advanced by the plaintiff to the defendant personally or to the partnership.

It was held by the learned Senior Subordinate Judge that the Rs.1,66,750 were a partnership debt. "The amount due to Shibba Mal", he said, "is Rs.1,66,750 of the Barshah Bulla property. Rup Narain's share is three-fourths in the property. Before he can get his share, the partnership debt due to Shibba Mal must be paid by him. His share, therefore, is liable for the amount." On the assumption that the debt was a partnership debt it is not, with all respect to the learned Subordinate Judge, easy to understand why the defendant's three-quarters share in the property should be saddled with the whole of it and not merely three-fourths. But in view of the conclusion to which their Lordships have come as to the nature of the debt this is not material. From this judgment and the decree founded upon it an appeal was taken to the High Court. It came on for hearing before Sir Shadi Lal and Abdul Rashid J. The appeal was allowed. Sir Shadi Lal in the course of his judgment, in which Abdul Rashid J. concurred, said that he was unable to accede to the contention that the loan was made by the plaintiff to the partnership and not to Rup Narain personally. He then referred to clauses 1, 2, 3 of the deed of the 24th November, 1921, mentioning in particular the statement in clause 3 that the Rs.68,750 had been invested by Shibba Mal for Rup Narain. "The language of this document", he said, "makes it clear that the aforesaid sum was advanced as a loan to Rup Narain and not to the partnership". He then referred to clause 6 as pointing to a like conclusion in reference to the cost of rebuilding, a clause which he pointed out was substantially repeated in the supplemental deed of the 6th June, 1924. He then proceeded as follows:—

> "In the face of these express covenants it cannot be contended that the plaintiff advanced the money to the partnership, and should, therefore, be regarded as a creditor of the firm."

Then after referring to the way in which debts of a partnership are provided for on a dissolution, he added this:—

> "Now, the money due to the plaintiff is not a debt of the partnership, and cannot be recovered from the partnership property. The question then arises whether, as against Rup Narain's share in the surplus, if any, of the partnership property, the plaintiff can claim priority over the other creditors of the debtor. It is true that the plaintiff advanced the money to Rup Narain to enable him to acquire his share in the estate, but our attention has not been invited to any authority in support of the proposition that that circumstance alone would give the former a lien on the latter's share in the partnership property. There is neither any statutory rule nor any general principle which would place the plaintiff on a footing higher than that occupied by the other creditors of the insolvent. His claim for priority over other creditors must, therefore, be disallowed."

With these observations of Sir Shadi Lal their Lordships desire to express their respectful agreement.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared there will be no order as to costs.

(11812—3A) Wt. 8168—30 190 11/38 P. St. G. 338

In the Privy Council

LALA NAND KISHORE, SINCE DECEASED, (now represented by Madan Mohan Lal minor, under the guardianship of Musammat Kalawati)

v.

AZMAT ULLA OFFICIAL RECEIVER, DELHI, AND ANOTHER

DELIVERED BY LORD ROMER

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