Privy Council Appeal No. 27 of 1938

Seyyado Ibrahim Saibo and others - - - - - *Appellants*

v.

Jainambeebee Ammal and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH NOVEMBER, 1939

Present at the Hearing:

VISCOUNT SANKEY
SIR LANCELOT SANDERSON
SIR PHILIP MACDONELL

[*Delivered by* SIR PHILIP MACDONELL]

This is an appeal from a judgment and decree of the Supreme Court of Ceylon setting aside a judgment and decree of the District Court of Nuwera Eliya and sending the case back to that District Court for an order of partition of certain land to be entered in an action wherein the respondents, plaintiffs in the action, sued the appellants, defendants in the action, for a partition of that land.

The land, an extent of two acres, one rood, and twenty-two perches, situate within named boundaries at Nuwera Eliya in Ceylon and known as "Fountain Store" or "Fountain House" was on the 7th May, 1902, conveyed on a notarial deed, P.3, to certain seven co-partners who had by notarial deed P.27 entered into a trading partnership on the 4th April, 1902. This, the first partnership of seven members, was succeeded on the 17th September, 1906, by a second partnership of six, five of them of the first partnership and one new member, and that on the 7th March, 1912, by a third partnership of nine, three members of the first partnership, the one brought into the second partnership, and five new ones. These three deeds of partnership, P.27, P.28 and P.29, were, each of them, notarial and similar in their main provisions. Each deed recites the total capital of the firm, the amount brought in by each partner and his share of profits, provides a time limit for the duration of the partnership and that the death of a partner is not to dissolve it, appoints by name one or more of the partners to be "principal partners" with express power to purchase and sell land for the partnership and to mortgage such land, and provides for the dissolution of the partnership and distribution of the assets, with an option to the principal partner

or partners to take over the assets and continue the business. Each of the two latter partnership deeds, P.28, P.29, refers by number and date to the deed preceding it, making the second partnership a successor to the first, and the third a successor to the second, and reciting that the accounts of the immediately preceding partnership have been gone into and agreed to. The second and third partnership deeds recite that the firm has landed properties—there is evidence that it had such, besides the land the subject of this case—but does not state their locality or extent. The third partnership deed while, like the others, giving to the principal partners full power to sell land the property of the partnership, also provides that on dissolution of the partnership " none of the said partners shall at any time be entitled to or ask to be given any lands or buildings or any shares in the lands and buildings of the said partnership whereso-ever situated," and gives power on such dissolution to the principal partners to obtain from the other partners convey-ance of " their respective shares right title and interest in all the landed property and buildings of the said partnership " to them the principal partners, the other partners being " hereby bound to convey their respective shares right title and interest in all the said landed property of the said partnership to the said principal partners " and their heirs or other legal representatives.

No. 5 of the original partners, by name Pavanna Ibrahim Saibo, was also a member of each of the two succeeding partnerships and executed each of the three partnership deeds. The three plaintiffs, respondents, claim under him as his intestate heirs, being his widow and his two sons. He himself died intestate on the 16th February, 1915, during the currency of the third partnership. His estate was not administered until 1931, this action being commenced in 1933. Owing to absence from the jurisdiction and minority, an issue of prescription does not arise.

The third partnership had occasion to mortgage portions of the land in question by three several notarial deeds executed on the 7th October, 1915—after, that is, the death of partner No. 5—and eventually on the 12th February, 1916, sold it by notarial deed P.9 to some of the defendants and a predecessor in title of other defendants, appellants. This deed, P.9, gives the numbers and dates of the three partnership deeds and of that by which the land had originally been conveyed to the partnership. It recites the mortgages on this land, the fact that No. 3 is the only one of the original partners still alive, also that the third partnership had bought in their respective shares in this land from a retired partner, No. 6, and the heirs of a deceased partner, No. 2, also that partner No. 5, under whom the plaintiffs claim, had died. It recites further that " although the premises " (i.e., this land) " were acquired in the names of the seven persons of whom the said partnership was originally composed and of whom the only person now alive is " the original partner No. 3, " the said premises have always been regarded as property of the said firm and have been possessed as such up to date without

any disturbance or interference whatsoever on the part of the heirs, executors or administrators of such of the original partners" as are dead, the said No. 3 "himself having always allowed the rents and profits of the said premises to be included in the accounts of the said partnership and to be distributed amongst the partners for the time being of the said firm according to their respective shares in the said business," also that "on the same principle the said premises have always been considered as part of the assets of the said partnership, and its value at the time of the taking of a general account has accordingly been included in estimating the amount available for distribution among the different partners," and that "on that footing each deceased or retiring partner has actually been paid the price of his interest in the said premises." This deed, P.9, selling to the defendants, or to their predecessors in title, gives in the schedule a description by extent and boundaries of the land sold, showing that it is identical with the land acquired by the first partnership on deed P.3. At different times, not material, the defendants and their predecessors in title bought in the outstanding interests of all the partners in this land, save that of No. 5 under whom the plaintiffs claim.

On the 17th July, 1917, the third partnership dissolved itself by notarial deed D.5.

The plaintiffs claim that under the deed P.3 conveying the land to the partners, No. 5 acquired in his personal capacity and without reference to the partnership, the legal and beneficial right to a one-seventh share therein. They also claim two sixty-third shares in it as follows. The retired partner No. 6 and the heirs of deceased partner No. 2 on the 14th May, 1912, sold to the third partnership, consisting as will be remembered of nine persons, of whom No. 5 was one, their two one-seventh shares. Of these two-sevenths, No. 5 would be entitled to a one-ninth or two sixty-thirds. These must be added to No. 5's original one-seventh, making eleven sixty-thirds in all.

The notarial deed P.3 of the 7th May, 1902, which conveyed the land to the first partnership, recites that the vendor has contracted for the sale and conveyance of the land "for the exclusive use and benefit . . . of the said co-partnership business," also that the seven partners, naming them, pay the purchase price "out of partnership funds" and "as co-partners," and it conveys to the seven partners, *nominatim*, "as co-partners," habendum "for ever for the use and benefit . . . of the said co-partnership." The law of Ceylon as to partnership is to be found in section 1 of Ordinance No. 2 of 1866, as follows:—

> In all questions or issues which may hereafter arise or which may have to be decided in this Colony with respect to the law of partnerships . . . the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted: provided that nothing herein contained shall be taken

> to introduce into this Colony any part of the law of England relating to the tenure or conveyance or assurance of, or succession to, any land or other immovable property, or any estate, right, or interest therein.

The portion of the law of England relevant to the present matter is section 20 (1) of the Partnership Act, 1890:—

> All property and rights and interests originally brought into the partnership stock or acquired whether by purchase or otherwise on account of the firm or for the purposes and in the course of partnership business are called in this Act partnership property and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

This land was "brought into the partnership stock" and "acquired . . . by purchase . . . on account of the firm and . . . in the course of partnership business" since it was conveyed to the seven partners "as co-partners," and the price for the purchase of the land was to be paid "out of partnership funds." It was acquired "for the purposes of the partnership business," one of these by the first partnership deed being the purchase of landed properties. The deed conveying it recites, as has been said, that the vendor has contracted to sell the land "for the exclusive benefit . . . of the partnership," and the habendum is to the partners, their heirs, executors, administrators and assigns "for ever for the use and benefit" of the partnership. Thus by this deed it became partnership property under the provisions of section 20 (1) of the Partnership Act, 1890. As the law to be applied, that of England, does not recognize a partnership firm as a legal *persona,* it was conveyed, as is a usual method under that law, to the seven partners of the firm *nominatim,* and by the instrument conveying it each of them acquired a one-seventh share in the legal title to the land and, since he would be entitled to share in any profits the land produced, in the beneficial interest also, but so that each of them used his share exclusively for the purposes of the partnership. At the trial of this action the District Judge was satisfied that the land thus became partnership property, but on appeal the Supreme Court dissented from this. In its view the Ceylon Statute of Frauds, Ordinance No. 7 of 1840, section 2, created, against holding this land to be partnership property, difficulties which might not have seemed so great had it been kept in mind that the onus was on the plaintiffs to show that each partner's one-seventh share in the land was his for his personal use, and that therefore the land was not partnership property.

Much of the argument for the plaintiffs on this appeal was accordingly based on this Ceylon Ordinance, No. 7 of 1840, section 2 of which provides that:—

> No sale, purchase, transfer, assignment, or mortgage of land or other immovable property and no promise, bargain, contract or agreement for effecting any such object, or for establishing any security, interest or incumbrance affecting land or other immovable property . . . shall be of force or avail in law

unless in writing and by notarial deed. The second and third partnership deeds do not refer specifically to this land, or state that the partnership succeeding to the first one took

or held it as partnership property, hence, it was argued, the members of the second and third partnerships, No. 5 being one of these, took it for their own benefit and not as partnership property; conversely, to enable the partnership to claim it as such property, the second and third partnership deeds should have contained words definitely stating it to be so. Various Ceylon cases were cited in support of this line of argument, and their Lordships were also invited to ascertain the intention of the deed P.3, conveying this land, by examining the subsequent conduct of the persons who executed it, a method of interpretation applied also by the Supreme Court in its judgment: thus when the retired partner No. 6 filed in August, 1909, the inventory of the estate of the deceased partner No. 2, he included therein a one-seventh share of "Fountain Store and premises," valuing that share at Rs.8,000, and inserted an item "Rents due Rs.4,420," and it was argued that these "rents" would be the deceased partner's share of rents due to the individual partners from the partnership for its occupation of the land, but this overlooks the fact that the partnership owned other lands in which this inventory also claimed shares, likewise that deed P.9 by which the third partnership sold this land, recites that its "rents and profits" were included in the accounts of the partnership, consequently these "rents" may have been due from tenants to the partnership, not from the partnership to individual partners.

An argument from the subsequent conduct of the parties to deed P.3, stronger at least *prima facie,* is the fact that in May, 1912, the third partnership bought, on notarial deed P.6, from this same retired partner No. 6 and from the heirs of the same deceased partner No. 2, the two one-seventh shares of those two partners in this land and in other partnership lands, for Rs.10,000 to each of them, and this sale and purchase for such a substantial consideration was claimed by the plaintiffs as an admission by the members of the third partnership, that this land was not partnership property but that of individual partners. The notary's attestation to the deed P.6 is however that in his presence No. 6 received, by cheque, only Rs.3,055-58 out of the consideration of Rs.10,000, and the heirs of No. 2, only Rs.8,871-41 out of a similar consideration, also by cheque. At the trial of the action in the District Court, a witness, Ena Sheik Davood, who had been in the employ of all three partnerships, produced for the defendants document D.7, being extracts from the firm's ledger account for 1911 and 1912, which showed that at the date when the third partnership bought these one-seventh shares, these sums Rs.3,055-58 and Rs.8,871-41 were the amounts standing in the firm's books to the respective credits of these former partners, and that cheques for these sums were put through the firm's bank account on their behalf about a fortnight later. Thus the notarial attestation and the document D.7 confirm each other. The recital to the conveyance P.6 describes the land, shares in which the third partnership was purchasing, as "part of the property and

assets" of the first partnership. The evidence in this case does not entirely explain why the third partnership bought these land shares for an ostensible consideration greater than the amount then standing in its books to the credit of the vendors, but the deed forming the third partnership executed about two months before, had provided that no retiring partner was to be entitled to any lands or shares in lands belonging to the partnership, also that on the dissolution of the partnership the partners were each to convey to the principal partners their several shares in such lands, and the conveyancers who inserted these provisions in the third partnership deed may have advised it to get in the outstanding legal titles of the retired partner No. 6 and of the deceased partner No. 2. On the administration in 1914 of the estate of partner No. 1, the inventory duly mentioned his one-seventh share of "Fountain Store," as well as of other partnership lands, but in the same proceedings the administrators of that estate moved the testamentary court to transfer to the firm those one-seventh shares, as being "property which forms part of the assets of the said firm," receiving in exchange "the sum of Rs.81,563 which represents the deceased's interest in the said firm." The same witness who had produced the ledger extracts, produced also the accounts of the second partnership for the year 1911, D.1, signed in two places by partner No. 5, which accounts showed the amounts then due to certain of the partners, including No. 5, as their respective shares in the profits, but by setting out the lands owned by the firm as an asset valued together at Rs.96,200, these accounts tended to negative the idea that any partner had a separate interest in them. This sale to the firm of partners' shares in this land does not, therefore, give an unequivocal support to the plaintiffs' case, and the same seems true of the purchases by the defendants, after they had acquired this land from the third partnership on P.9, of other outstanding partners' shares. That these things lack complete explanation may well be due to lapse of time. If the estate of a man dying in 1915 is only administered in 1931, and action only taken for what is claimed thereunder in 1933, evidence may have become unavailable which was available in 1915 and following years.

But generally this line of argument for the plaintiffs, namely, interpretation of the deed of conveyance, P.3, by the subsequent conduct of the parties to it, overlooks the fact that in this case the onus is on the plaintiffs; it is not for the defendants to show that this land was partnership property but for the plaintiffs to show that it was the property of the individual partners. Parties to a partition action must make clear title to the land they seek to partition and must identify what land it is that they claim. If plaintiffs here begin with the deed P.9 by which the third partnership sold the land in derogation, as they claim, of their rights, it will be noticed that that deed describes the land fully by boundaries and extent but also asserts in clear terms—set out above—that the land had always been treated as partnership property, and recites the power of the partners to sell it. If the plaintiffs rely on the deed P.29 establishing the third partnership, it will be noticed that that deed, while it states that the

partnership owns lands, and while it gives the principal partners power to sell them and on dissolution of the partnership to call for conveyances from the several partners of their interests therein, yet does not specify what those lands are or where. The deed creating the second partnership, P.28, describes the partners as " of the shop . . . Fountain Store " but again does not specify the lands of the partnership while stating that it does own " properties ", and while giving the principal partner power to sell them. The plaintiffs must go then to the deed P.3 by which the first partnership obtained a conveyance of this land. This deed specifies the land by boundaries and extent but also makes it partnership property within section 20 (1) of the Partnership Act, 1890. The plaintiffs' action then fails. The only two deeds executed by the partnership which identify this land or mention it specifically, are the notarial deed P.9, the sale of the land under a power given by *inter alios* partner No. 5, which deed states the land always to have been treated as partnership property, and the notarial deed P.3, the purchase of the land by the partnership which, executed under a power given by *inter alios* partner No. 5, makes it partnership property. On this view of the case, the failure of the plaintiffs to make out the partners' personal claim to this land, the onus being on them to do so, it becomes unnecessary to consider how far Ordinance No. 7 of 1840, section 2, and the cases cited thereon in argument, are applicable in the present matter.

The interest in the land of partner No. 5, Pavanna Ibrahim Saibo, is outstanding as a dry legal title which by their counterclaim the defendants ask the plaintiffs to transfer to them. They must, however, pay to the plaintiffs the share of the partnership assets due to partner No. 5. One of the defendants, in his evidence in the District Court, said that the share of this partner had been deposited with " the Katugastota firm," and the defendants' answer in a connected case gave the name of that firm, and said that the amount so due to No. 5 was originally Rs.2766-82 but had now increased to Rs.6090-53, and was available to his heirs, but there is no evidence to show whether the plaintiffs admit or deny these figures. It is to be hoped that the parties will agree as to the sum due to the plaintiffs for partner No. 5's share in the assets of the firm, and so avoid further litigation, but failing agreement there must be an inquiry which should be carried out in accordance with such directions as the Supreme Court may give.

Their Lordships are of opinion by reason of the foregoing considerations that this appeal must be allowed, the judgment and decree of the Supreme Court set aside and the judgment and decree of the District Court of 24th May, 1935, restored, the defendants to have their costs in each court. On the counterclaim, the plaintiffs on receiving the amount agreed to as being, or found on inquiry to be, the share of the partnership assets due to No. 5, Pavanna Ibrahim Saibo, must execute to the defendants a conveyance of the shares of the land which they claim in this action.

Their Lordships will humbly advise His Majesty accordingly. The appellants will have the costs of this appeal.

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DELIVERED BY SIR PHILIP MACDONELL

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