Privy Council Appeal No. 14 *of* 1947

Pearey Lal – – – – – – – – – – *Appellant*

v.

Nanak Chand and others – – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1948

Present at the Hearing :

LORD NORMAND
LORD MACDERMOTT
SIR JOHN BEAUMONT

[*Delivered by* LORD NORMAND]

The suit in which this appeal arises was begun in June, 1938, in the Court of the Subordinate Judge in Delhi by the respondent, Nanak Chand, with whom his two sons were associated as plaintiffs, against his father, the appellant. The respondent claimed that the family was a joint Hindu family governed by the Benares School of the Mitakshara, and prayed for a partition of a cycle business carried on at Delhi and Bombay, as he alleged, as a joint family business. He said in his Plaint that the appellant had turned him out of the business in September, 1936, and had not allowed him since then to take any part in it.

There is now no question that the family was a joint Hindu family.

The respondent, who was born in 1891 and married in 1912, resided in the appellant's house till 1917 according to the finding, now acquiesced in, of the Subordinate Judge. A younger son, Raghu Nath Parsad, had always had his home in the appellant's house save when he was attending to the Bombay branch of the cycle business, and all his living expenses have been defrayed by the appellant. Considerable sums of money were spent on the celebration of the marriages of members of the family, the respondent's marriage in 1912, the marriages of two of his daughters in 1931 and 1935 and of two of the daughters of the younger son in 1933 and 1937. These sums and other sums expended on the family and its members were derived from the profits of the disputed business but that was the only considerable source of the income and fortune of the members of the family and the circumstance has at most an indefinite and slight bearing on the question whether the cycle business was the separate property of the appellant or part of the assets of the joint family.

That is now the only question to be decided. On it the learned Subordinate Judge found in favour of the appellant and dismissed the suit, but the High Court has reversed his judgment and after finding that the cycle business was a joint family concern has granted decree for joint possession.

It is common ground that the appellant inherited nothing and that there was no nucleus of ancestral property from which the cycle business could have been developed. It is also common ground that the cycle business was originally financed from the accumulated profits of a cloth, tailoring and drapery business also carried on in Delhi. The respondent claims that he was associated with the appellant in the cloth business from its commencement in the year 1904 and that he was also associated with the appellant in the cycle business from its modest origin as a repair shop about 1915 till he was turned out in the days of its prosperity in 1936. The appellant's case on the other hand is that he alone was concerned in the cloth business, which he built up from a humble beginning as a hawker of cloth, and that the respondent was in no way concerned with the cloth business at any stage of its development, but was while it lasted engaged in sundry ventures of his own as a tailor in Delhi. It is also the appellant's case that the respondent after the failure of another separate venture as a partner in an ironmonger's business in 1919-22, became a salaried employee in a position of no responsibility in the appellant's cycle business in 1923, and that he left it in 1925 to become a partner in a rival cycle business, but that on the termination of this partnership in the same year he returned to the appellant's cycle business, again as a salaried employee. The respondent, it should be added, answers to this that the alleged separate business ventures and partnerships in which he engaged were all of them off-shoots or extensions of the joint family business.

There is no issue of law to be decided, and both parties were content to put the question between them thus:—has it been shown by the respondent that he was associated in the business, started by the appellant's initiative and carried on mainly or wholly under the appellant's direction, in such a manner as to raise a reasonable inference that the appellant intended to make and did make the business a joint family business? This formulation lays the *onus* on the respondent and in a case in which there is no ancestral property the *onus* is heavy. If it is proved that the business had at some time been made a joint family business, no subsequent change of intention on the part of the appellant and no unilateral act of his could undo what had once been done.

The evidence is bulky and it has been reviewed and discussed in the Judgments of both the Courts in India. Their Lordships will therefore concentrate attention on the salient points argued to them. It must be noted that the only witnesses who were examined before the learned Subordinate Judge were the appellant and two other witnesses adduced by him. The Subordinate Judge has found that the appellant's evidence was substantially true. If that finding stands the respondent's case must fail. It is therefore necessary to consider *in limine* whether the High Court was justified in rejecting the appellant's evidence notwithstanding the finding of the Subordinate Judge. The finding is not unqualified. The learned judge had already rejected the appellant's assertion in his written statement that none of the respondent's children was born in the appellant's house and his evidence that the respondent ceased to reside there about 1914, matters about which his memory was not likely to be at fault. But there are other things in the appellant's evidence which can scarcely be accepted as honest testimony. He says that the respondent at the age of seventeen started a tailoring business at a shop in Chandni Chowk, Delhi, and kept it going for two years with no help of any kind from him. This seems improbable, especially as the respondent was then living in the appellant's house. Again the appellant's case is that in 1911 to 1915 the respondent, who was still living in the appellant's house, carried on a tailoring business in a shop which was adjacent to his own shop at Kashmir Gate. Yet he professes not to have known the name under which the respondent was then trading. But he now alleges that the respondent was in fact carrying on business under the names " Peary Lal-Nanak Chand " or " E. S. Pearey Lal-Nanak Chand ". If that had been true the respondent must have been trying to attract business to himself by an illegitimate use of

his father's name in conjunction with his own. But it is impossible to believe that the appellant was as negligent of his own interests and as indifferent to this competition by his son as he professed to have been. The conclusion that the appellant was untruthful about the respondent's activities in the period before the cycle business was begun is irresistible. A finding that a witness is telling the truth is of the greatest value when it is made by a judge who saw all the witnesses or at least the important witnesses on each side. But such a finding by a judge who saw none of the witnesses on the other side is of small value, and it ought not to survive the criticisms to which the evidence of the appellant lies open.

It is therefore necessary to consider the other matters founded on by the parties. Among these there is nothing equal in importance to the respondent's testimony in his examination in chief that the cycle business was assessed to income tax as a joint Hindu family business, and that the assessment notices were in the appellant's possession. He was not cross-examined on these statements and he was not contradicted. All that the appellant said about them is that the business had been assessed for twenty years and that he had not been keeping the notices received from the income-tax department. The necessary conclusion is that the business was assessed as a joint family business. That may not be conclusive in favour of the respondent, because there might be an advantage to the appellant, though he was the true owner of the business, in having it assessed to income-tax as a joint family concern. But as no explanation has been offered by the appellant, the fact that the assessment was made on the joint family goes far to establish the respondent's case. Before leaving this topic it should be mentioned that an attempt was made by the respondent to include in the evidence in the suit a copy of an assessment which he had obtained from the Income Tax authorities. This attempt failed for reasons which need not be explored now. Oral evidence of the contents of the original asessments is competent because the originals have on the admission of the appellant not been preserved and because the oral evidence is the best evidence that it is in the respondent's power to tender.

There is other evidence, less compelling, which supports the respondent's case. Thus the co-existence of two adjacent shops in which tailoring was carried on, one of them under a name which combined the names of the appellant and of the respondent, and the other under the appellant's name, can best be explained if both shops formed part of a single joint family business. This conclusion is greatly strengthened by the proof that on three occasions in 1911 and 1912 the appellant collected and appropriated sums due under Small Causes Court decrees to the firm " Peary Lal-Nanak Chand " or " E. S. Pearey Lal Nanak Chand ". He explains that he did this by mistake, but he does not account for the respondent's failure to have the alleged mistake rectified. The appellant's explanation is unconvincing and the natural explanation is that he was collecting what he was entitled to collect as the manager of the creditor firm named in the decrees.

Each of these matters singly might not constitute proof of the respondent's case. But *juncta juvant* and together they are sufficient to discharge the *onus* which rests on him, heavy though it is, for their effect is not offset by other facts and circumstances on which the appellant relied.

Of these the most significant are certain entries in the Hindi books of account for the business in the period from 14th April, 1930, to 3rd November, 1934. There are regular monthly payments to the respondent, some of which are entered after the words " cash paid in full settlement for the month " or equivalent words. A number of these entries are in the respondent's handwriting. There are also entries expressly debiting these payments to " salary account ", but those entries are at a date later than any entry in the respondent's handwriting. The learned judges of the High Court have found that the books were irregularly and badly kept and that there is evidence of tampering with them for the

purpose of affecting income tax assessments. Their Lordships are not satisfied that this charge of tampering with the books has been made out, but there is no doubt that the books are irregularly and unskilfully kept. It is, however, not unjust to the respondent to treat as good evidence against him entries which he made himself. But while these entries are suggestive of payments in the nature of salary, they are also, as the High Court held, consistent with payments in the nature of an allowance made to him as a member of the joint family.

It is proved that from 1919 to 1922 the respondent carried on an ironmongery business in partnership with one Rama Nand, and that in 1925 he carried on a cycle business in partnership with one Nathu Mal. Rama Nand and Nathu Mal each admitted that he had entered into a partnership with the respondent, but denied that the appellant had been a partner also. These proved partnerships, it was argued, afford support to the appellant's case. Yet they are in themselves consistent with the case put forward for the respondent that he entered into them, not as an individual and on his own account, but as representing the joint family and in furtherance of the business carried on by it. This indeed seems to be the probable account of the matter, for on the termination of the partnership with Nathu Mal the shop occupied by it was at once taken over by and used for the disputed cycle business, a circumstance which suggests that the two businesses had never been rivals and that there had been an association between them though it was concealed from Nathu Mal.

In 1934 Raghu Nath Parsad seems to have offended his father by leaving the Bombay branch of the cycle business of which he was then in charge in order to visit Kashmir. The appellant dismissed him from the business and revoked his authority to act for it. Subsequently there was a reconciliation on terms humiliating for Raghu Nath Parsad, who accepted the position of an employee. The High Court held that this incident is of less importance than appears on the surface. This son seems to have been subject to the dominating will of his masterful father, and to have been unable to resist his authority. Two years later the appellant tried to dispose of the respondent in the same way. Him, too, he dismissed and he revoked with ostentatious publicity his authority to act for the cycle business. But the respondent was of firmer mettle than his younger brother, and the correspondence shows that he was by no means the cypher in business that the appellant represented him. He did not submit to his father's arbitrary actions but commenced the present suit to assert his rights.

Their Lordships for the foregoing reasons will humbly advise His Majesty that the appeal should be dismissed and the Judgment appealed against should be affirmed. The appellant must pay the costs of the appeal.

(59592) Wt. 8013—20 180 3/48 D.L G. 338

In the Privy Council

PEAREY LAL

v.

NANAK CHAND AND OTHERS

DELIVERED BY LORD NORMAND

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1948