

Nola Chandroutie

Appellant

v.

Lutchmie Devi Gajadhar

Respondent

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 3RD NOVEMBER 1986

Present at the Hearing:

LORD KEITH OF KINKEL

LORD BRIGHTMAN

LORD TEMPLEMAN

LORD GRIFFITHS

LORD GOFF OF CHIEVELEY

[Delivered by Lord Brightman]

The principal question which arises on this appeal from the Court of Appeal of Trinidad and Tobago is whether a surviving partner was entitled to bring proceedings to enforce her claim to a share of the partnership assets, against a third party who had assumed possession of those assets, without joining in the proceedings some person to represent the estate of the deceased partner. A subsidiary question is whether such surviving partner is entitled to receive her share of the net realised partnership assets as at the present day, with intermediate profits, or whether she can be required to accept a valuation figure as at the date of the death of the deceased partner plus interest to date.

The plaintiff in the action was Basdabie Maharaj, whom it will be convenient to call "the widow". She lived with her husband Bissoondial Maharaj in a shop-house in Riverside Road, Fonrose Village, Poole in the island of Trinidad. The shop-house was the family home and also a shop for the sale of dry goods, rum and medicinal substances to the people of the village. The shop belonged to her husband, but as he had other business interests the widow largely ran it on his behalf. They had four children, one of

whom was a son Rammanan, usually known as "Tan", and another of whom was a daughter Lutchmie Devi. The husband died in June 1953. By his will he gave "the lot of land with the shop-house and all stock in trade and things thereto belonging situate at Riverside Road", together with all cash in the bank, to the widow and Tan, clearly expecting them to continue the running of the business as their joint venture, as indeed they did. The business prospered. In 1962 the family, then consisting of the widow, Tan and his wife Nola who is the appellant in these proceedings, and Lutchmie moved to another shop-house in St. Croix Road, Princes Town. The business continued to do well. Ten years later the business was moved to its present premises at Tramline Street, Princes Town.

Unfortunately in 1973 family relationships deteriorated. Nola told Tan that he would have to choose between his mother and herself. In the outcome, in July 1973, the widow and Lutchmie were turned out of the home and Tan and Nola appropriated the business to themselves. According to Nola's evidence, it was carried on as a partnership business by the two of them. At this time Tan was about forty years of age, and the widow about seventy-one.

In April 1975 Tan died, and Nola thereafter ran the business on her own account. Tan is said to have left a will appointing the Bank of Nova Scotia to be his executor, and leaving all his property to Nola and their four surviving children in equal shares. However, no will has been proved and no representation has ever been taken out to Tan's estate.

On the assumption that a partnership at will existed between the widow and Tan, the strict legal position at the death of Tan was that the partnership was then dissolved (if it had not previously been dissolved by conduct) and the widow as surviving partner had exclusive authority to deal with the assets of the partnership. She had the sole right and the duty to realise the assets, to discharge the liabilities and to divide the net proceeds between herself and the estate of Tan.

On 24th January 1978 the widow issued proceedings against Nola. This was four and a half years after she had been ousted from the partnership, and almost three years since the death of Tan. By her statement of claim, which did not follow until almost two years later, the widow claimed that a partnership existed between herself and Tan, which had been dissolved by his death, and that the business had been appropriated by Nola. The widow claimed a declaration that she was entitled to the whole of the business, or in the alternative to a half-share, and

also claimed accounts and enquiries appropriate to a winding up of the affairs of the partnership. Any claim on the part of the widow that she had a beneficial interest in the whole of the partnership assets (if such was intended to be made) was unsustainable and was abandoned at the beginning of the hearing.

In her defence, Nola claimed that the business had belonged to herself and Tan in partnership, and that the widow had no interest whatever therein. She claimed in effect to be entitled to the business as the surviving partner, subject no doubt to a duty to account to Tan's estate for his half-share.

The action came to trial in January 1981 and lasted for eleven days. Counsel for the widow closed his case on day six. Counsel for Nola then submitted that there was no case to answer because the action sought to establish the existence of a partnership between the widow and Tan and ought therefore to have been brought against the personal representative of Tan; Nola was not such a representative. The learned judge ruled against that submission and the trial continued. He found that a partnership existed in the shop business from the death of Bissoondial until the death of Tan in April 1975, when it was dissolved. The learned judge made an order in the following terms:-

- "1. A declaration that the Plaintiff, Basdabie Maharaj is entitled to one half-share of the business carried on as a Grocery known as 'Ramnanan Gajadhar Wholesale and Retail Merchants' situate at Tramline Street, Princes Town, together with all property purchased from the said business.
2. A tracing order to determine what if any property has been purchased out of the profits of the said business.
3. An account of all the credits property and effects belonging to the business at the death of Ramnanan Gajadhar.
4. An account of the profits of the said business since the death of the said Ramnanan Gajadhar.
5. An account of what is due to the Plaintiff under and by virtue of the aforesaid declarations.
6. Payment to the Plaintiff under and by virtue of the aforesaid.

7. An injunction restraining the Defendant from disposing of or otherwise dealing with the aforesaid business or property to the detriment of the Plaintiff."

This order corresponded with the relief which was sought by the plaintiff in her statement of claim.

Nola appealed. In her notice of appeal she challenged the finding of a partnership between the widow and Tan, and also asserted that the action involved a claim against property held by the deceased Tan and could not be heard and determined in the absence of a legal personal representative of his estate.

The judgment in the Court of Appeal was delivered by the Honourable Mr. Justice Braithwaite, Justice of Appeal, with whom the Honourable Mr. Justice Hassanali and the Honourable Mr. Justice Bernard, Justices of Appeal, concurred. The learned judge said that there was evidence of an overwhelming nature both oral and documentary to support the findings of the trial judge and he was in agreement that there was a partnership between the widow and Tan. On the procedural issue he considered that Nola's status was that of an *executor de son tort* in relation to Tan's share in the partnership business, and that she was liable as such to account for the assets of which she had taken possession; she was therefore properly sued in her personal capacity and was liable to the widow to account for the latter's half-share of the partnership assets. As regards the relief to which the widow was entitled, he said this:-

" It would appear that in making his order, the judge did not address his mind to the operation of the provisions of section 35 (1) of the Partnership Act, Chap. 81:02 whereby the partnership dissolved on the date of the death of Tan, that is to say, on the 11th April, 1975. It was open to the respondent to bring the instant action any time after that event; but she did not bring it until the 24th day of January, 1978, and there has been no explanation for the inordinate delay. In the circumstances I would not order the appellant accountable to the respondent beyond that date.

I would vary the judge's declaration that the respondent is entitled to one half-share of the value of the partnership business and would substitute therefor a declaration that the respondent is entitled to one half-share of the value of the partnership as that value stood on the 11th April, 1975."

The widow died shortly after the order of the Court of Appeal was made, and her daughter Lutchmie was substituted in her place.

Nola now appeals to their Lordships with the leave of the Court of Appeal. In opening the appeal Nola's counsel conceded that he could not challenge the conclusion that the widow and Tan were partners in the shop business and he relied on the procedural point which is expressed as follows in the printed case:-

"That the respondent wrongly instituted proceedings against the appellant, when such proceedings should properly have been brought against the proper legal representative of the estate of [Tan]."

In the opinion of their Lordships there can be no doubt that the widow was entitled to sue Nola to enforce her rights so far as they had been usurped by Nola. It is not in dispute that Tan and Nola *de facto* conducted the shop business as from the widow's explosion on 17th July 1973, and that Nola conducted the business on her own account as from the death of Tan on 11th April 1975. As their Lordships have already indicated, the *de jure* position was that the partnership between the widow and Tan was dissolved on 11th April 1975 (if not dissolved earlier by inference) and that Tan's estate was thereupon entitled to a half-share of the net proceeds produced by a winding up of the partnership business; the right and duty of the widow as between herself and Tan's estate was to get in the partnership assets and to realise them for the benefit of both. The partnership assets however were all held by Nola, and there can therefore be no doubt that the widow was entitled to call upon Nola to deliver up the assets to her for the purpose of realisation. That would however have been a somewhat unrealistic course having regard to the age of the widow and the fact that she had been out of possession for over four years. The appointment of a receiver would have been preferable. But an action against the personal representative of the estate of Tan alone, had one been constituted, would have been a totally unsatisfactory proceeding since Tan's estate possessed no partnership assets and was not entitled to possess any. All that Tan's estate was entitled to was a share of the proceeds of realisation. An action against such a personal representative would only have established the existence of a partnership between the widow and Tan, and would not have recovered the assets of the partnership, all of which were wrongly held by Nola. In these circumstances it appears to their Lordships beyond dispute that Nola was a necessary and proper party to any proceedings brought by the widow for the purpose of enforcing her

rights as surviving partner. Admittedly the finding in the present proceedings that a partnership existed between the widow and Tan is not in theory binding on the estate of Tan, but that has no bearing whatever upon the duty of Nola to account to the widow; as between Nola and the widow, the widow was the survivor of a partnership which existed between herself and Tan, and Nola was in wrongful possession of the assets of that partnership.

Their Lordships respectfully differ from the Court of Appeal in their conclusion that the delay of two and three-quarter years between the death of Tan and the issue of the writ deprived the widow of her right to a half-share of the present realisable value of the partnership assets or to an account of profits. Where a partnership is dissolved by the death of one partner and the surviving partner continues the business for some years without realisation, the estate of the deceased partner *prima facie* remains entitled to an appropriate share of the proceeds of sale of the assets and is not confined to a share of the value of such assets as at the date of death; see *Barclays Bank Trust Co. Limited v. Bluff* [1982] Ch. 172, with which decision their Lordships are in agreement. *A fortiori* a partner who has been wrongly ousted from the partnership by his co-partner, who continues to carry on the business, is entitled to the appropriate share of the proceeds of realisation and is not confined to the value of the assets at the date of ouster or the later death of the wrong doing co-partner. There are no facts pleaded by the appellant in her defence, and there is no finding of fact of the learned judge, nor is any point of law relied upon, which can lead to a conclusion that the widow has lost her ordinary partnership right to a share of the proceeds of realisation, thus reflecting the current value of the assets, or that she has lost her right to an account of profits.

A sale of a partnership business in accordance with the rights of an outgoing or deceased partner is usually contrary to the best interests of the person currently running the partnership business. It is to be hoped that wise counsels will prevail and that Nola will make a fair and realistic offer to the widow's estate which will avoid the necessity for accounts to be taken and the business to be realised.

Their Lordships will dismiss the appeal, but will restore the form of order made by the learned trial judge. The appellant will pay the costs of the appeal.



