K. Mohammad Ziauddin Sahib

Vs

Kosha Abdul Munaf Saheb and Others

Civil Appeal No. 1037 Of 1967

(A. N. Ray, I. D. Dua JJ)

29.08.1972

JUDGMENT

DUA, J. -

1. This is plaintiff's appeal with the certificate from the judgment and decree, dated August 4, 1958, of the High Court of Judicature at Madras allowing the appeal of defendant No. 1 (in the trial court) from the judgment and decree, dated February 27, 1954 passed in the plaintiff's suit for the partition of family property and for dissolution of family partnership and accounts by the Additional Subordinate Judge, Vellore.

2. The suit was instituted in March, 1934. It is unnecessary to refer to the chequered career of the suit. Suffice it to say that the trial court passed the preliminary decree in December, 1939. This decree directed, inter alia, that the accounts be taken of the assets and liabilities of the business of Dada Mian & Sons carred on by the plaintiff and the defendants from November, 1925 till the date of the suit, i.e. March 27, 1934. Broadly, the form of this order had in fact been settled with consent of the parties before the appellate court and the case had been remanded to the trial court for partition and division of the property and for delivery of possession. The trial court, however, made a detailed decree specifying the shares of the parties, to which it is unnecessary to refer for the purposes of the present appeal.

3. Defendant No. 1 took the matter on appeal to the Madras High Court. That appeal was disposed of in December, 1942. The High Court disagreed with the trial court on certain matters. Apart from the conclusions and directions given by the High Court with respect to the other properties with which we are not concerned in this appeal, the High Court said :

> ".....It will also follow that in calculating the sums due to the various partners in Exhibit II, which sums were all carried forward to the new partnership with the exception of what was taken away by D.W. 1, Rs. 16,350 will have to be excluded. The sums then ascertained as due to the various partners will be deemed to be the capital contributed by them in the new partnership of 1925.....
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> .....We do not however find any reason for thinking that the entitle "Dadamian & Sons" in other words the family was the ejaman in the new partnership. The word "ejaman" was prefixed only to Dadamian, whose name still found a place in the new accounts, even though he was dead and to Abdul Ali, who had ceased to be a partner. Moreover, we think that a ejaman partnership is inconsistent with the terms of the contract entered into by the parties in Exhibit III. If we read Exhibit III with Exhibit

II and examine the accounts it becomes clear that the various parties to Exhibit III contracted to conduct a new business, sharing as partners in the ordinary way with certain defined shares."

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"The learned Subordinate Judge has left open the question as to what were the assets of the business subsequent to 1925; and we feel that as the suit proceeded in the lower court on the basis that the details as to the division of the property and the ascertainment of the rights in individual items acquired after 1925 should be left to the final decree stage, it is desirable that the accounts already filed should be looked into and other evidence permitted to show from what sources this property was acquired. The accounts may show that the purchase price of a particular item of property has been debited to a particular partner. If so, then the property would probably be his. It might appear that property as acquired out of money belonging to Dadamian, in which case it would be the property of the family. It might, alternatively have been acquired out of profits, in which case in would belong to all the partners. Another possibility is that it was acquired out of money belonging partly to Dadamian's family and partly to the partners as such, in which case it would have to be divided amongst the heirs of Dadamian and the partners in proportion to the amounts taken from the two sources. We therefore express no opinion at all as to the ownership of Items 6, 7, 10 and 14 of the Schedule C properties, represented by Exhibits T, U, Z and CC. We need hardly add that in examining the accounts of the new partnership, the possibility that transactions appearing in the name of the first defendant may have been for the benefit of the partnership or of the family should not be lost sight of."

4. Pursuant to the preliminary decree, after failure of two commissioners to discharge their duty satisfactorily a third commissioner was appointed to take account to the partnership business and to ascertain shares of the parties in the profits and losses and to divide Items 6, 7, 10 and 14 of the plaint (Schedule C). He submitted his report to the trial court which, after considering the same and the objections raised thereto by the parties, passed the final decree on February 27, 1954. Defendant No. 1 preferred an appeal to the High Court against that decree. The High Court modified the trial court's decree in certain respects. It is in these circumstances that the present appeal by the plaintiff has been presented to this Court.

5. The only grievance the appellant seems to have in this appeal relates to his claim in the assets forming partnership business which was extensive. Shri Latifi, learned counsel for the appellant, in the first instance tried to assail the very basis of the ascertainment of shares of the various partners in that business by submitting that their rights and liabilities were governed by Mohammadan law and not by the terms of the partnership. This attempt was, however, soon given up and, in our opinion, rightly.

6. The learned counsel in fact challenged the conclusion of the High Court only on certain items. The general arguments, however, was confined to the challenge to the non-production by defendant No. 1 of the accounts of partnership. It was submitted that defendant No. 1 was mainly looking after the partnership business and had in his custody all the accounts of the business. He stood in a fiduciary capacity towards the younger members of the partnership and had, therefore, to satisfy the conscience of the court that the interest of the other members of the partnership particularly of the plaintiff had not suffered and had been fully safeguarded by him. The accounts before 1925 were not produced and the explanation that they had been accidentally destroyed is unacceptable. On this reasoning Shri Latifi contended that adverse inference should have been drawn against defendant

No. 1. This argument, in our opinion, ignores the concluding portion of the judgment of the High Court when passing the preliminary decree. It has been stated that the profits of the business prior to 1925 had all been realised and carried forwarded as capital in the business continued after the settlement of account, Exhibit II. Profits of the business were, therefore, to be considered only from November 19, 1925. The High Court observed :

> "In view of our finding with regard to the nature of the business entered into in 1925 we do not find any distinction can be drawn between the various partners. All of them worked in the business, and the profits should be divided amongst them in accordance with the shares indicated in Exhibit III. We have already indicated that the capital credited to the various partners in the accounts subsequent to 1925 will have to be reduced proportionately on account of the exclusion of Rs. 16,350. from the profits of the business. The amount to be paid to each partner will of course depend not only on his share of the business and the capital contributed by him, but also on the sums withdrawn by the several partners and members of the family. Such amounts as have been debited to these partners in their individual accounts will of course be deduced from the sums that would otherwise be due to them. If any of them has withdrawn more than what was due to him by way of capital and profits, he will be made liable under the decree to be passed for the sum found due by him. It will also follow from the fact that the business of 1925 was not a ejaman partnership, that the parties, except the ninth defendant, who was a minor will have to bear their share of losses if it should be found that the business has resulted in loss. As we find no reason to think that Exhibit SS and the other accounts of the business are not correct we see no objection to the accounts being treated as such if they are properly proved, and provided that there is no evidence that they are in any way incorrect. In case this has not been clear elsewhere, the share of Dadamian in the new partnership will be considered as the property of the family to be divided among the females as well as the males according to the rules of Muhammadan Law. In other respects the decree of the lower court is affirmed."

7. In so far as the accounts after November 19, 1925 are concerned, they were all before the Commissioner and the courts below. The grievance that the relevant accounts were not produced is, therefore, unfounded. The plaintiff's contention raised in the trial court that the first defendant had kept two sets of accounts, one for income tax purposes and the other showing the real state of affairs was repelled by that court as unsubstantiated. This conclusion has not been shown to be in any way erroneous.

8. We will now deal with the specific items canvassed by Shri Latifi. The first item to which he took objection is a sum of Rs. 23,900 deposited with the Burmah-Shell Company. It is complained that this item is not entered in the accounts. This seems to us to be factually incorrect because in the trial court the objection was clearly confined only to the amount of interest having not been entered in the accounts. This is what the trial court said in this connection :

> "The plaintiff's next grievance is that interest on the amount of Rs. 23,900 which is admitted by D.W. 1 to be in deposit with the Burmah-Shell Company is not entered in the kasar or profit account. The sum of Rs. 23,900/- deposited with the said Company is evidenced by the entry as page 3 of Exhibit 42, dated February 28, 1933. The plaintiff point out to page 420 of Exhibit 42 where interest up to February 28, 1934 on this deposit amount is credited as Rs. 718-15-3. The rate of interest works

> out to 3 per cent. per annum. The plaintiff contends that such interest should be credited for the prior years also. But, interest on the entire amount of Rs. 23,900 cannot be allowed for the previous year because page 2 of Exhibit 41, the previous ledger shows that the deposit amount was only Rs. 9,500 as on February 29, 1932. Rs. 500 was added on April 25, 1932 a further sum of Rs. 700 on May 25, 1932. On December 27, 1932 a further sum of Rs. 13,200 was added making in all the sum of Rs. 23,900 entered at page 3 of Exhibit 42. Interest has to be calculated on the various amounts from the dates of the deposits above mentioned. So calculating at the rate of 3 per cent. per annum from February 29, 1932 to February 28, 1933 the interest is Rs. 285, Rs. 12-8-0, Rs. 15-12-0, Rs. 66-0-0, amounting in all to Rs. 379-4-0. This sum has to be credited to the profits.
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> The objection of the 1st defendant is that if interest had been paid on the deposit amount for the previous years, it would have been entered in the accounts. As stated before, that is merely begging question. There was no reason why interest was not allowed in the previous years while it was allowed in the years 1933 to 1934."

Incidentally it may be pointed out that the respondent's counsel also submitted that this objection had not specifically raised before the Commissioners. This seems to be so. It is clear that the appellant's grievance has no merits.

9. The next item canvassed relates to stock-in-trade or stock-in-hand. According to the respondent with respect to this point also no objection was specifically raised before the Commissioner. The Commissioner has referred in his report to the movable assets and liabilities and has observed :

> "One contention of the plaintiff is that I have to divide the movables, assets, liabilities belonging to the firm. So far as the movables are concerned, the value of gunnies, empty tins, etc., have been entered in the accounts and even losses incurred on that account are stated in the account. Apart from these, I have not been pointed out to any evidence on either side of the existence of any other movables. I find from the accounts profits are ascertained by taking the actual prices of each commodity dealt with by the partnership less the expenses. These profits are now in the hands of the first defendant in the shape of assets, i.e., outstandings less liabilities and the first defendant has been asked to pay the several shares, the share of the profits and the capital contributed by each of the partners. So, the question of dividing the assets and liabilities in specie does not arise."

The trial court has dealt with this grievance in these words :

> "Another point of dispute between the parties is the movable of the business such as stock-in-trade and deposits. The Commissioner has dealt with this aspect at page 9 of his report. He says that it was not pointed out to him that any such movables were in existence and that he finds from the accounts that profits are ascertained by taking the actual price of each commodity dealt with by the partnership less the expenses. He also says that the profits are now in the hands of the 1st defendant in the shape of outstandings less liabilities and, therefore, the question of dividing the assets in specie does not arise. The accounts do show that some of the items in stock-in-trade prior to March 27, 1934 have been taken into account and valued in arriving at the profits but that is not the case with all the stock-in-trade. Even if the stock-in-trade

> has been taken into account in arriving at the profits each year that is as it should be. But the stock-in-trade will not disappear on that account. It will still be an asset of the partnership to be divided among the partners as the dissolution. We are concerned with the date March 27, 1934 which is the date for winding up of the affairs of this partnership. The stock-in-trade as on that date is an asset of the partnership liable to be divided among the partners at the dissolution. Exhibit 77 is the ledger of the partnership for the year 1934-1935. Up to March 27, 1934 the balance stock on hand must be taken into account and their value will be ascertained. The value will be ascertained on the basis of the sale next preceding the date March 27, 1934. A separate statement will be worked out on this basis. This will be the value of the stock on hand as on March 27, 1934. This value should be treated as the assets of the partnership and will be added to the profits and divided among the partners and according to their shares as specified in Exhibit III."

The High Court disposed of this objection in these words :

> "Another item objected by Mr. Thyegarajan is a sum of Rs. 30,051-10-4 representing the value of the stock on hand. Mr. Thyagarajan's case was that this was already taken into account by the Commissioner in working out the profits and assets. This appears to be so. That is the reason why the plaintiff never objected before the Commissioner. We allow this amount to be deducted from defendant 1's accountability as arrived at by the lower court."

10. We are unable to find anything wrong with this reasoning. The appellant's grievance regarding this item is thus clearly unfounded.

11. The next item convassed relates to the Vaniyambady oil stock. The trial court dealt with this item in these words :

> "The next point urged by the plaintiff is in respect of the Vaniyambady and Ambur depot accounts. Page 461 of Exhibit SS the first ledger shows the Vaniyambady depot account and page 471 of Exhibit SS shows the Ambur depot account. The Vaniyambady depot account is shown as commencing from March 28, 1926 while the Ambur depot account is shown as commencing from March 30, 1926. But the plaintiff points out to Exhibit A-2 which is a stock book in respect of the Vaniyambady and Ambur depots. This account book of the 1st defendant himself shows that the dealing both in Vaniyambady and Ambur depots commenced even earlier from November 19, 1925 which is the date of the commencement of the suit partnership under Exhibit II. The plaintiff complaints that accounts for about four months from November 19, 1925 to March 28, 1926 and March 30, 1926 have been suppressed by the 1st defendant."

The High Court dealt with this item as under :

> "The next was a sum of Rs. 18,607-12-0 towards Vaniambadi oil stock. Now the evidence seems to show that only empty tins had to be valued in some cases and not even they in some others as it was a trade on commission and the tins also mostly belonged to the suppliers besides the oil and the company got only a commission on the sales. This commission is estimated at sum of Rs. 600. So, a sum of Rs. 18,000

must be allowed under this head. This was one of the items not objected to before the Commissioner by the plaintiff."

We do not find any error in this conclusion. Challenge with regard to this item is, therefore, repelled.

12. The next item relates to tobacco account, also called Ondiputhur tobacco account. This is what the High Court has said regarding this item :

> "The next item is regarding a sum of Rs. 18,111-12-8 towards Ondiputhur tobacco account. That was also not objected by the plaintiff before the Commissioner. We allow it, as Mr. Srinivasan and Mr. Viswanathan are unable to show any reason to the contrary."

In the trial court this item was dealt with as under :

> "The Ondiputhur account starts at page 558 of Exhibit SS on January 23, 1927. I have already stated that the entries up to May 12, 1927, are in one ink. They appear to be genuine entries. These debits shown there are the amounts advanced by the firm Dadamian Sahib and sons for the purchase of tobacco at Ondiputhur. Taking these entries alone into account up to May 12, 1927, there is a total debit of Rs. 20,801 and credit of Rs. 2,349-4-0. Deducting the latter sum from the former the balance of Rs. 18,451-12-0 is the sum actually advanced by the business to the Ondiputhur Vasakattu account. It is only this sum that should be deducted from the assets of the tobacco account.
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> In arriving at the profits of the tobacco business I do not accept the entries in page 289 of Exhibit UU commencing from November 30, 1930. At this time, the prior suit O.S. No. 14 of 1930 between the parties was pending in this Court. The previous entries are found at page 258 and tracing it back to page 257, the total credit as on December 28, 1929, is shown as Rs. 40,243-2-11. This is the entry which should be relied on because there was no dispute as on that date between the parties. Deducting the above sum of Rs. 18,451-12-0 in the Ondiputhur Vasakattu account the balance of Rs. 21,791-6-11 is the profit of the tobacco business to be credited to the assets of the business. The Commissioner has shows the profits from the tobacco business up to March 30, 1930, as Rs. 1,819-5-2 plus Rs. 1,860-5-1 making in all a sum of Rs. 3,679-10-3 while the actual profits has now been fixed at Rs. 21,791-6-11. The difference between these two sums must be credited to the profits in Schedule I to the Commissioner's report."

Now before the Commissioner all that seems to have been urged is this :

> "Plaintiff states that we must brush aside all these account books and calculate the profits on the basis of the profits in Exhibit II for all the years from 1925 to the date of suit. The proportionate profits calculated on that basis have to be allowed. I do not think in view of the High Court judgment in A.S. No. 36 of 1940 already referred to above, I can brush aside these account books and determine the profits as stated by plaintiff."

Clearly nothing specific was urged about the tobacco account. The conclusion of the High Court,

therefore, seems to us to be unexceptionable and indeed the appellant's learned counsel was unable to persuade as to disagree with it.

13. The next item relates to Bowringpet business. According to the appellant this business was subsidiary of the main partnership business and, therefore, all the profits from this business must be included in the account of the main partnership business. The counsel relies on the reasoning of the trial court in support of this submission. The trial court observed :

> "We now pass on the Bowringpet business which according to the plaintiff was part of the business conducted by Dadamian Sahib & Sons. The first defendant has not produced any of the accounts relating to this business though he was summoned by the plaintiff to produce them. His contention is that this business is a separate business carried on by him in partnership with other and that, therefore, the plaintiff is not entitled to any interest in it. The Commissioner has dealt with this matter at pages 9 and 10 of his report. He says that the Bowringpet business cannot be said to be a business carried on by the suit partnership because the first defendant was carrying on the business in partnership with strangers who had nothing to do with this partnership. I do not think that a sufficient ground for negativing the plaintiff's contention. The suit partnership had been carrying on some business in partnership with persons who were not partners in the suit partnership. For instance the tobacco business is said to have carried on in Vasakattu with others who were not partners of Dadamian Sahib & Sons. This is admitted by the counsel for the first defendant. Therefore the mere fact that the first defendant has been doing the Bowringpet business in partnership with other will not show that it is not on behalf of the suit partnership. As has been pointed out by the Commissioner himself, the 1st defendant had utilised the funds of the suit partnership for conducting the Bowringpet business in petrol and kerosene. There is also a ledger page in the suit partnership accounts for the Bowringpet business as stated by the Commissioner. These clearly show that the Bowringpet business is also part of the suit partnership. The High Court has held that the 1st defendant must account for the business carried on by him in his own name as well as the business formely known as Dadamian Sahib & Sons. The Bowringpet business being admittedly one of the businesses carried on by 1st defendant in his own name though along with others, it is covered by the High Court's decree and the 1st defendant must account for his share of the profits of that business also.
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> But the 1st defendant having failed to produce the account books of this Bowringpet business in spite of the plaintiff's notice given to him, interest on the amount utilised by the 1st defendant from the suit partnership must be charged in lieu of the profits. I think that the 1st defendant is suppressing the accounts of this business because this business yielded considerable profits. This business deals in petrol and kerosene. The plaintiff claims interest at 24 per cent. per annum but I think that this is excessive. I think that 12 per cent. per annum would be a reasonable rate of interest."

The High Court dealt with this item thus :

> "The next item is a sum of Rs. 11,608-0-9, representing the profits got by the Bowringpet business and interest thereon. Mr. Thyagarajan contended that a sum of Rs. 5,500 had been drawn out by the 1st defendant from the suit partnership assets for becoming a partner in the Bowringpet business, and that the 1st defendant would

> be liable only for this Rs. 5,500 with interest at 6 per cent. per annum from the date of drawing as the profits were not greater. Worked out on that basis, it will come to Rs. 8,600 and odd. So relief can be claimed only regarding the balance of Rs. 3,000 under this head. This was one of the items objected to before the Commissioner by the plaintiff."

In our view, the High Court's approach is correct and the trial court had wrongly assumed that the fact that defendant No. 1 had entered into a partnership with a stranger after withdrawing certain amounts from the partnership must be held to be a part of the main business. We do not think there is any material to justify this conclusion. The appellant's challenge thus fails.

14. The next item refers to petrol leakage and betel nut. The High Court has dealt with these items in these words :

> "The next item is a sum of Rs. 4,074-8-0 claimed as refund of family funds for purchase of Items 6, 7, 10 and 11. In view of our finding that items 7 and 10 were actually purchased for the family, and that an adjustment has been made regarding the advance for the purchase of the other two items this item disallowed. The next item is a sum of Rs. 2,113-12-10 claimed by the plaintiff as allowance for petrol leakage. But, in those days, it appears that the bunk system of pump petrol had not come into vogue, and no leakage seems to have been allowed for petrol as it was supplied in leak-proof 2 gallons tins. The evidence shows this. We believe the evidence and we allow this item in favour of defendant 1. Next we come to Rs. 3,400 claimed for betal nut wastage. Some wastage was inevitable in a trade in betel nut, but more than 5 per cent. is not justifiable in the absence of proof of actual wastage above that limit. So we allow Rs. 2,500 under this head and disallow the rest."

The criticism levelled by Shri Latifi that the accounts with regard to petrol leakage were not produced is, in our opinion, unacceptable for it is normally not practicable to keep account with respect to such petrol leakage. In regard to betel nuts also as observed by the High Court some wastage is inevitable and this wastage can normally be fixed only approximately and this is precisely what the High Court had done. We do not find any cogent ground for disagreeing with the approach of the High Court and for interfering with this conclusion.

15. The last objection relates to the claims of the widows. According to Shri Latifi the widow should have got only one-fourth share and the High Court should have left the question open. In our view, the High Court has rightly dealt with this claim and the appellant's grievance seems to be unfounded.

16. The result is that this appeal fails and is dismissed with costs.

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