

ALLAHABAD HIGH COURT

Sughra

Vs

Babu

Second Appeal No. 877 of 1947

(Sapru and Agarwala, JJ.)

26.09.1951

JUDGMENT

Agarwala, J.

1. This is a second appeal arising out of a suit for dissolution of partnership and rendition of accounts. Abdul Shakoor, father of the plaintiffs, and Wali Mohammad, father of the defendant, used to carry on the business of commission agency as partners under the name and style of Abdul Shakoor Wali Mohammad. They used to charge commission on the sale of goats. The share of each partner was half and half. Abdul Shakoor died in 1938 and, after his death, Wali Mohammad carried on the partnership business in partnership with the major plaintiffs while the minor plaintiffs were admitted to the benefits of the partnership. The share of Wali Mohammad and the plaintiffs was also half and half. Wali Mohammad died in 1940 and his place was taken by his son, Babu, defendant-respondent, in the partnership whose business was carried on as before. The plaintiffs' case was that the partnership account books remained in possession of Wali Mohammad and after his death in the possession of his son, Babu, that both of them used to keep the accounts and, that therefore, the defendant is liable to render accounts to the plaintiffs. The plaintiffs, therefore, prayed for rendition of accounts but did not specify the period for which the accounts were to be rendered. They also prayed for dissolution of the partnership.

2. The defendant-respondent admitted the partnership as alleged by the plaintiffs, but he alleged that Abdul Shakoor used to keep the accounts and cash, that he did not pay anything to Wali Mohammad and misappropriated the assets of the partnership, that no accounting was ever done since the inception of the partnership, that Abdul Shakoor used to charge commission at the rate of Rs. 2-8-0 per score of goats from his customers but in the account books entered it at the rate of 12 annas per score of goats. The defendant, therefore, claimed that accounts be taken from the plaintiffs from the commencement of the partnership and a decree may be passed in his favour for the amount which may be found due to him.

3. In the trial Court the parties agreed that a preliminary decree be passed and a Commissioner be

appointed to find out the money due to from (1) the commencement of the partnership upto 25th June 1938, the date of Abdul Shakoor's death and (2) from 25th June 1938, upto the date of accounting. They further agreed that after the receipt of the Commissioner's report the Court should decide as to which party was liable for the amount and for what period. A preliminary decree was passed in accordance with this agreement. The Commissioner submitted his report and found that Abdul Shakoor kept the accounts and the cash upto the time of his death that he charged commission at the rate of Rs. 20-8-0 per score of goats and entered the same at the rate of Rs. 1-3-0 in the books, that after Abdul Shakoor's death, Wali Mohammad and then Babu used to keep the accounts, that upon examination of the account books a sum of Rs. 13,232-12-3 was due from the plaintiffs to the defendant up to the death of Abdul Shakoor and that thereafter a sum of Rs. 875-6-4 was due from the defendant to the plaintiffs.

The learned Munsif, after scrutinising the accounts passed a decree in favour of the defendant for Rs. 11,700 to be recovered from the assets of Abdul Shakoor in the hands of the plaintiffs. The defendant was ordered to pay court-fee on this amount which he did. Against this decree the plaintiffs appealed and the defendant filed cross objections. The appeal and the cross-objections, were dismissed. The plaintiffs have now come up in second appeal to this Court.

4. Two points have been urged before us, firstly, that on the death of Abdul Shakoor there was a dissolution of the partnership and that since the suit was filed more than three years after the death of Abdul Shakoor, no accounting of the time before his death could be gone into and secondly, that in order to cheat the Income-tax Department the partners entered in their account books commission at the rate of Rs. 1-3-0 instead of Rs. 2-8-0 per score of goats and that having achieved their object, one of the partners could not now turn round and claim that accounting may be done on the basis of the commission charged, that is, at the rate of Rs. 2-8-0

5. The first point which arises for determination is whether the partnership was dissolved on the date when Abdul Shakoor died. Section 42, Partnership Act lays down that, subject to a contract between the partners, a firm is dissolved by the death of a partner.

6. In para. 3 of the plaint the plaintiffs made the statement that

"Abdul Shakoor aforesaid died about three years ago and thereafter the partnership business aforesaid was carried on by Wali Mohammad alias Wali, according to the previous partnership, in partnership with the plaintiffs (heirs of Abdul Shakoor and Mt. Maryam Bibi) till his life time and the plaintiffs and Wali Mohammad, alias Wali remained entitled to profits and liable for loss in equal shares",

and in para. 4, they stated,

"that after the death of Wali Mohammad alias Wali which occurred about one year ago, the defendant in partnership with the plaintiffs began to carry on the agency business aforesaid, the plaintiffs and the defendant have continued to be entitled to profits and liable for the loss in the business aforesaid half and half."

The defendant admitted the contents of paras. 3 and 4 and added,

"after the death of Abdul Shakoor, which occurred more than three years ago, plaintiffs 2 to 5 in their own right and plaintiff 1 for self and as guardian of minor plaintiffs 6 to 9, according to previous rules became partners in the firm of Abdul Shakoor Wali Mohammad with the defendant's father. After the death of Wali Mohammad, the father of the defendant, the plaintiffs became partners of the defendant, in the said firm on previous terms and rules."

7. It was, therefore, admitted that the business continued as before even after the deaths of Abdul Shakoor and Wali Mohammad. The dispute between the parties was whether a new partnership was constituted after the death of Abdul Shakoor or the old partnership continued and was not dissolved by his death. From the conduct of the heirs of Abdul Shakoor and Wali Mohammad's son the Court below came to the conclusion that there must have been a contract between the original partners, that the partnership would not be dissolved by the death of a partner within the meaning of clause (c) of Section 42, Partnership Act. For this proposition it relied upon *Gokul Krishna Das v. Shashimukhi Dasi*¹, *Basanti Bibi v. Babu Lal*², and *Ram Kumar v. Kishori Lal*³,

8. It appears to us that the view taken by the Court below cannot be supported. The general rule is that a partnership is dissolved after the death of a party. This rule is, however, subject to a contract to the contrary. When it is said that a partnership will not be dissolved by the death of one party, what is meant is that the partnership will continue between the surviving partners even after the death of a partner. It follows that in order that the exception to the general rule may apply the original partnership must consist of more than two partners. In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is a contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue. Nor is the position affected by bringing in the heirs of a deceased partner on the scene. One partner cannot, by his own contract, impose a partnership upon his heirs or legal representatives. Partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent, express or implied.

9. When, however, there are more than two partners and when there is a contract between the partners that the partnership will not be dissolved by the death of one of them the old partnership continues as between the surviving partners and the heirs, if they come in, may come in place of the deceased partner and become partners upon the old terms. In such a case it will not be a new partnership but will be treated as the old partnership which continues without a break.

10. Of the authorities mentioned by the lower Court, the first two are not opposed to this view.

11. In *Gokul Krishna Das v. Sashimukhi Dasi*⁵, the original partnership consisted of more than two persons. There was no direct evidence to show what the contract between the parties at the inception of the partnership was. But the subordinate Judge held - and his view was not contested before the District Judge - that the conduct of the parties since 1887 showed that there must have been a contract between the original parties that the partnership would not be dissolved by the death of any partner.

12. In *Basanti Bibi v. Babu Lal*⁶, the original partnership was between a large number of persons, namely, 30. The partnership was in respect of a factory and the partners treated their shares as if they were shares in the unregistered Company. The business had been going on for a very long time and there was no evidence on record that the business had been treated as dissolved on each of the occasions on which one of the 30 partners died. In these circumstances it was presumed that there must have been an implied contract to the effect that the death of one of the partners would not dissolve the partnership business.

13. In *Ram Kumar v Kishori Lal*⁷, there were only two partners. It was held that since the business was carried on even after the death of one partner by the surviving partner and the heirs of the deceased partner, it must be presumed that there was an agreement between the original partners that the partnership would not be dissolved upon the death of a partner. With great respect we are unable to agree with this pronouncement. Not only can such an agreement be considered to be valid, (sic) when made in the case partnership consisting of only two partners, but also the mere fact that on one occasion only on the death of one of the partners, the heirs continued the business of partnership, will be too slender a foundation for drawing an inference about the existence of an agreement to the contrary within the meaning of Section 42 between the original partners. The considerations mentioned by us above were not brought to their Lordships' notice. The observations on the point were, however, not necessary for the decision of the case as well in this last mentioned case reference was made to two other cases not already noticed namely, *Anant Ram v. Channu Lal*⁸, and *Punjab and Sind Bank Ltd., v. Kishan Singh*⁹, in both of which the original partnership consisted of more than two partners.

14. Even though, however, in our view a new partnership was created on the death of Abdul Shakoor, the right to have the accounts taken from the commencement of the old partnership is not affected. As already observed, after the death of Abdul Shakoor the major heirs along with Wali Mohammad continued the old partnership business with the old partnership assets with the same rights and liabilities as before with this difference merely that in place of Abdul Shakoor his heirs were substituted, the major heirs became the partners and the minor heirs became entitled to the benefits of the partnership. In these circumstances an agreement between the parties must be implied that rights and liabilities of the new partners will be taken to be as if Abdul Shakoor's death had created no dissolution in the partnership or in other words that they were liable on the accounts being taken from the commencement of the old partnership or from the date of the last accounting, as the case may be. This view is supported by authority.

15. In *Aabdul Jaffar v. K. Venugopal Chettiar*⁹, it was held that "when a partner dies, the partnership comes to an end under the Contract Act. But nevertheless, if the remaining partners continue the business for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership, and there will be no question of limitation at all in such a case as that, for the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing

partners was to the new partnership." See also *Ahinsa Bibi v. Abdul Kader*¹⁰,

16. The heirs of Abdul Shakoor came into the new partnership in place of the deceased partner and their father's share was treated as their own in the new partnership with the same rights and liabilities.

17. A distinction must, however, be drawn between the liabilities of the heirs for the period before Abdul Shakoor's death and those accruing after his death. The liability of the major heirs, for the assets of the old firm in the hands of Abdul Shakoor could not be personal and must be restricted to the assets of Abdul Shakoor in their hands. The liability of the minor heirs can only be to the extent of their shares in the partnership assets and can be neither personal nor extended to the assets of Abdul Shakoor in their hands unless the assets of Abdul Shakoor could be identified as the assets of the firm.

18. The next question is whether an accounting could be taken on the basis of the commission being Rs. 3-8-0 per score of goats or must be restricted to Rs. 1-3-0 as entered in the account books. It has been found that Abdul Shakoor used to charge Rs. 2-8-0 and not Rs. 1-3-0.

19. Mr. Sri Narain Sahai, learned counsel for the appellants, has urged before us that since the partners cheated the Income-tax Department by conspiring to prepare false accounts one of them cannot turn round and claim that the real commission was charged at the rate of Rs. 2-8-0. This plea was not raised in either of the Courts below and as it involves an investigation into facts we cannot allow it to be raised, for the first time, in second appeal. In our opinion, the Court below, on the materials before it, was justified in taking accounts on the basis of the commission being at the rate of Rs. 2-8-0 per score of goats. No other point was urged.

20. The result, therefore, is that we modify the decree of the Courts below. The decree for the amount found due by the lower Court will stand in favour of the defendants against the assets of Abdul Shakoor in the hands of the plaintiffs-appellants 1 to 5 namely, Sm. Sughra, Sm. Kubra, Sm. Zaibunissa, Sm. Noorunisa, and Sm Munnan. A decree for the same sum against plaintiffs-appellants, Ghulam Sabir, Ghulam Ghaus and Ghulam Shakir shall be confined to the assets of the firm Abdul Shakoor Wali Mohammad, if any, in their hands. In other respects the decree of the Courts below will stand.

21. In view of the partial success and failure of the parties we direct the costs of this appeal to be borne by the parties.

Order accordingly.

Cases Referred.

116 Cal WN 299
21930 All LJ 1517
3AIR 1946 All 259
416 Cal WN 299
51930 All LJ 1517

6AIR 1946 All 259
725 All 378
8AIR 1935 Lah 350
9AIR 1924 Mad 708
1025 Mad 26