

BOMBAY HIGH COURT

Raghunandan Nanu Kothare

Vs

Hormasji Bezonji Bamji

(Amberson Marten, Kt., C.J. Kemp, J.)

11.08.1926

JUDGMENT

Amberson Marten, Kt., C.J.

1. Before we hear the main appeal it is convenient first to determine issue No. 1 in the trial Court, viz., whether the defendant was a partner in the firm of Messrs. Nanu Hormasjee & Co. This is cross-objection No. 1.

2. Now here we have the circumstance that the plaintiff and defendant, who are two experienced solicitors of the High Court of Bombay, deliberately enter into an agreement of July 31, 1915, Exh. A, under which they expressly agree that "they shall be partners in the said firm of Nanu Hormasjee & Company and shall practise as attorneys under the said name and firm." The partnership is to be for one year, and on its determination the defendant is to "cease to have any claim or interest in the firm and its out standings, the property, name and goodwill thereof."

3. Further, the plaintiff and defendant gave a general notice as follows :We beg to inform you that we have admitted Mr. Hormusji Bezonji Bamji (the defendant) into partnership with us from this date. We shall continue to carry on our business under the same style as before. Mr. Bamji will sign as below.

4. This was on July 1, 1915, Exh. 34. After that for several years the defendant was left in sole conduct of business, mainly because it appears that the plaintiff was ill. The plaintiff admits in his evidence at p. 129 of Part I that the defendant "after he became a partner could sign for the firm, could pass receipts for the firm, operate on the banking accounts, and could give an undertaking on behalf of the firm in all matters attended to by him. He could give an undertaking in my absence on behalf of the firm. These are all matters which a partner alone can do. This does not constitute the management of the firm and of the firm's business."

5. In 1920 it appears that the plaintiff took a more active part in the business. But troubles arose,

and about August 1921 the parties dissolved partnership. Accordingly, in his letter of July 28, 1921, the plaintiff wrote to the defendant:-I propose sending out notices to the profession and others about our dissolution as from the 1st proximo. I am really very sorry the dissolution which could have been arranged smoothly, peacefully, quietly, and in the interests of both of us has to be done in this way.

6. Then follows, on August 1, 1921, a notice of dissolution which runs:-The undersigned Hormasjee Bezonji Bamji having as from this day ceased to be a partner of the firm of Nanu Hormasjee and Co., Mr. Raghunandan N. Kothare will continue the business under the old name of Nanu Hormasjee and Co. at the above address (our old office premises).

7. That notice is signed by both the alleged partners. Now, I am not necessarily going to interpret the document of July 31, 1915, in the light of subsequent events. But it must be borne in mind that that original document was for one year only ; that no further document was executed : and presumably, therefore, the parties afterwards continued at will on the terms of Exh. A. If then it was originally a partnership, it became a partnership at will as from August 1915. So, too, I quite appreciate that the legal existence of a partnership has to be determined from all the facts. A statement in a document that nothing therein contained is to constitute the relationship of partners, will not necessarily prevent the parties from being partners in the eyes of the law. So, too, a mere statement that the parties are to be partners will not necessarily constitute them partners in law. Further, although two persons may, as here, hold themselves out to be partners and be liable to third parties accordingly, yet it does not necessarily follow that they would be partners inter se.

8. Accordingly, the real point of the plaintiff's argument is that no matter what these solicitors thought they were doing and no matter whether they became liable as partners to third parties under the doctrine of holding out, yet in fact this agreement did not constitute a partnership in law, because they did not agree to share the profits of the business between them, and consequently they did not satisfy the definition of partnership in Section 239 of the Indian Contract Act. It is further said that this definition is different to that which prevails in English law where the usual definition of partnership is somewhat to this effect, viz., "The relationship which exists between persons carrying on business in common with a view to profit."

9. Bearing that argument in mind, it is pointed out that under Clause 3 of Exh. A the defendant in lieu of his share of profits in the business was to be paid Rs. 500 a month. In other words, this Rs. 500 per month was to be irrespective of whether profits were earned or not. Similarly, the defendant was not to be responsible for any losses. Then as regards the furniture, library, stock-in-trade (I do not like the expression "stock-in-trade" for a solicitors' firm, but that has slipped in by some mischance), all that is to remain the property of the plaintiff. Further, upon the

determination of the partnership the defendant was to cease to have any claim or interest in the firm and the outstandings, the property, name and goodwill thereof. That clause would seem to imply that up to that date he had an interest, although on the dissolution all those assets would pass to his partner. The final clause contains a provision for arbitration "if during this partnership any dispute shall arise with reference to this agreement or partnership hereby created." The word "or" is in the original. Probably the sentence should run "or the." But it is clear from this clause alone that the parties thought they were creating a partnership.

10. Now, as regards the question of losses in a business, I think it is perfectly open to partner A to say that as between himself and his partner B, the partner A shall bear all the losses of the business. In other words, it is not essential to constitute a partnership that the partners should agree to share the losses. In any event this only applies as between themselves, for whatever their agreement may be, they would both be liable to outside parties. So, too, partners may agree that on the determination of their partnership, the assets are to be dealt with in a particular way and that for instance all the assets are then to belong to partner A. In this connection it must be borne in mind that solicitors are not a trading firm. Their capital, normally speaking, is only small, apart of course from the goodwill which in many cases no doubt has a substantial value. But there is nothing whatever to prevent partners agreeing that on a dissolution, partner A shall be entitled to the entire goodwill of the business and shall not be called upon to account for it on the final winding up.

11. Next, we come to the main point, viz., the question about sharing the profits. My personal view is that partners can agree to share, those profits in any way they like. They may agree to share them equally. They may also agree, in my opinion, that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying in accordance with the profits actually earned. Take this case for instance. Would not the difficulties pointed out by the plaintiff disappear here, if the agreement had been drafted in this form, that out of the profits of the partnership the defendant should be paid a preferential Rs. 500 a month, but that if and in so far as the profits of the business should be insufficient to pay that sum, then the plaintiff would pay the deficiency to the defendant out of his own pocket? I do not think- any objection could have been taken to such an agreement, if it had been entered into, as not coming within the express words in Section 239. But, in my opinion, that is what the parties have substantially agreed on here when they said that "in lieu of his share of profits "the defendant was to get a particular fixed sum. In other words, the defendant thus became a salaried partner which is an expression we are quite familiar with not only in England but also in Bombay.

12. Another instance may be given. Suppose you had an agreement one day between two alleged partners by which they were to share the profits equally. And then the next day they met and said

that to avoid the trouble of elaborate accounts and so on partner B would agree to take for better or for worse, Rs. 500 per mensem from A whether or no profits were actually earned. In other words, partner B agreed to compound his rights under the agreement of the day before in this particular respect. Would they then cease to be partners? In answer to that illustration counsel for the plaintiff contended-and he had to contend-that on the day of the variation the parties would thenceforth cease to be partners. Personally I do not think that the wording of Section 239 obliges us to put that limited construction on the essentials for the relationship of partners. We have been referred to no authorities on the point, and the only reference to any text book which we have been given is to Pollock and Mulla's Indian Contract Act, at pp. 752 and 753, where the authors very properly point out the difference of language in the formal definitions of partnership in the English and Indian Acts respectively.

13. Looking at the matter as one of common sense, it is to my mind almost absurd to think that two experienced solicitors of our High Court should enter into a formal agreement to become partners, and then so far as the outside world goes and so far as the correspondence between them goes, act as partners for some six years and give the usual notices of dissolution and yet be told at the end that they were entirely mistaken as to their true legal position, and that they did not know the elementary principles which go to constitute a partnership, although that was a matter on which they would be presumably advising their clients frequently. I am glad to think that I am not driven by Section 239 to adopt that conclusion, and, therefore, with great respect to the contrary opinion of the learned trial Judge, I would hold that issue No. 1 was wrongly answered in the Court below, and that it should be answered instead in the affirmative.

Kemp, J.

14. I have reached the same conclusion and for the same reasons. I would like to observe, further, that the practice, as is well known here with reference to attorneys who are employed on a salary and are not partners in solicitors' firms, is that any letter written by any such salaried attorney is signed in the name of the firm with the superscription of that attorney. It is admitted in this case that the signatures were not in that form. That clearly suggests that the parties to this suit intended that the defendant should be considered as a partner.

15. Then there are other acts which suggest that they were partners, and amongst these are the following :-On one occasion the defendant raised the salary of the staff. If the defendant were a manager no doubt he might have the power of dismissing or appointing members of the staff, but I consider that when you came to the question of raising salary that would be a matter which he would have to refer to one of the partners.

16. Again the defendant brought moneys into the firm. It is true most of the moneys were

brought into the firm as loans prior to his becoming a partner but it appears that subsequent to his becoming a partner he lent moneys to the firm but without interest. That to my mind is not what a servant of the firm would do.

17. Then there is the fact that this agreement is drawn by attorneys who are presumably legal experts. To this fact the Chief Justice has already referred.

18. There is also the evidence which shows how the salary of the defendant was arrived at. It appears that in 1913-1914 the estimate of the amount drawn by the plaintiff was Rs. 1,000 a month, and on that estimate the defendant's salary was fixed at Rs. 500. Under the circumstances, that would be a very proper reason why the share of the profits of the firm should be compounded by appropriating under the agreement to the defendant Rs. 500 a month. The obvious advantage of any such arrangement would be that there would be no necessity for accounts of the partners being taken either at the end of the year, or when the partnership was dissolved, The trouble of drawing up a balance sheet would be avoided by compounding his share of the profits by a salary to the partner.

19. Then there is the fact that the stamp on this document is the stamp for a partnership agreement, and that suggests that the intention of the parties was that the defendant should be regarded as a partner. On this point I think the principle laid down in the case of *Mollwo March, & Co. v. The Court of Wards*(1) is applicable. There it was stated that the question whether the relation of a partnership does or does not exist must depend on the real intention and contract of the parties. Now that was a case which was decided in July 1872. It is true that the Indian Contract Act came into force in September 1872. I am of opinion that the principle there laid down is equally applicable in determining whether in the case of an agreement subsequent to the coming into force of the Indian Contract Act the question arises as to whether it is a partnership or not.

20. Under these circumstances I agree with the answer proposed by the Chief Justice to issue No. 1 in the case.