

## **Shiam Sunder vs L. Pratap Chandra on 29 March, 1950**

**Equivalent citations: AIR1952ALL330, AIR 1952 ALLAHABAD 330**

**Author: Ghulam Hasan**

**Bench: Ghulam Hasan**

### **JUDGMENT**

Misra, J.

1. This appeal arises out of proceedings for preparation of a final decree in a suit for rendition of partnership accounts after dissolution. The parties, Shiam Sunder, plaintiff, and Pratap Chandra, defendant, entered into a partnership business on 2-9-1939, for sale of cloth, in mohalla Daliganj, Lucknow. The defendant was to provide the funds and the plaintiff was to act as the working partner. The business was dissolved on 20-8-1940. A fresh partnership was begun on 3-9-1940, and was dissolved in January 1941. The shop was then finally closed. The stock, which was in hand at the time, was in possession of Pratap Chandra. A major portion of it was mixed up by him with the goods of his own cloth shops and was sold sometime between 1941 and 1942 without any separate account being kept of its sale.

2. Shiam Sunder's suit was instituted on 11-4-1942 and the preliminary decree was passed on 28-11-1942. The application for preparation of the final decree was preferred on 1-5-1943, and on 11-5-1943, a Commissioner was appointed by the learned Munsif South Lucknow, for evaluating the surplus partnership stock which had been sold. According to the Order, the value was to be determined at the prevailing rates, in other words, at the prices current on 11-5-1943. Apart of the stock was in hand and the Commissioner, auctioned it for Rs. 1.262/8. The order of 11th May, was passed ex parte and Pratap Chandra when he got to know of it filed an application, on 5-7-1943, claiming that the plaintiff's share in the stock disposed of between 1941 and 1942 should be determined with reference to the prices current in January 1941 which was the date of dissolution of the partnership. The order sheet of 14-12-1944, shows that the parties arrived at an agreement on that date to the effect that the Commissioner should also ascertain the prices which the defendant realized and he should prepare another account on the basis thereof. The Court ordered that this should be done and the Commissioner after examining the evidence, prepared two sets of accounts: account (A) based on the prices of May 1943 and account (B) relating to the prices which the defendant should be deemed to have realised by sales. There was considerable difficulty in preparing the second account in view of the absence of any separate records of those sales but eventually a modus operandi was found by the Commissioner and there is no objection by any side to the method of accounting. According to account (A), a sum Rs. 13,220-6 was payable to the plaintiff. In account (B) Rs. 55-2-9 were shown as due to the plaintiff and Rs. 1207-5-3 to the

defendant. The question, whether the liability of the defendant should be made dependent upon the prices prevalent in May 1943 or upon the prices fetched when they were sold was on the date of the agreement reserved for disposal at the time of judgment. The learned Munsif eventually held that account (A) was more appropriate and he accordingly passed a final decree in favour of Shiam Sunder for Rs. 13,220-6. The defendant Pratap Chandra went up in appeal and the view which the learned Civil Judge took was that the liabilities of the parties should be determined on the basis of prices current at the date of the suit, namely, April, 1942. The case was, therefore, remanded for a fresh account on that footing. The new account prepared by the same Commissioner showed that Rs. 1242-1-9 were due to the plaintiff. The lower appellate Court reversed the trial Court's decree and entered instead a decree for the plaintiff for Rs. 1242-1-9. The defendant was satisfied with the decision but the plaintiff has appealed.

3. The sole question which needs decision is whether the lower appellate Court was justified in taking the date of the suit as the correct date with reference to which the price of the stock in hand left with the defendant on the date of the dissolution fell to be ascertained. It is conceded on all hands, and I think rightly, that Section 46, Partnership Act, applies to the case. That section provides that on the dissolution of a firm every partner has a right against the others to have the property of the partnership applied in payment of its debts and liabilities and to have the surplus distributed according to the shares of each partner. The stock in the present case was not distributed or evaluated on dissolution. In the hands of Pratap Chandra, the goods of the dissolved partnership must of necessity be deemed to have been held under a fiduciary relationship : see *Babu v. Official Assignee, Madras*, 61 Ind. App. 257. The appellant's argument is that since it was the duty of the defendant to keep the partnership goods separate from his own and to produce them in Court when required to do so, he must be held liable, if he is not able to give the plaintiff his share of the goods, to pay their price as at the date of default which according to the appellant's learned counsel, was the date of the appointment of the Commissioner. Reliance is placed on the *Official Assignee of Madras v. Sri Minakshi Vidyasalai Paripalana Sangam*, A. I. R. (17) 1930 Mad. 24 and *Nagappa Chettiar v. Official Assignee of Madras*, A. I. R. (17) 1930 Mad. 276 for the proposition that when a trustee mixes the trust fund with his own, the whole may be treated as trust property except in so far as the accounting partner may be able to distinguish them from those which were his own.

4. Under section 66, Trusts Act, the result of wrongful intermingling of trust property with the private property of the trustee, entitles the beneficiary only to have a charge on the entire property for the recovery of the trust fund and since Section 51 of the Act prohibits a trustee from using the trust property for his own profit, it is obvious that the property plus the profits derived therefrom must be made available for distribution amongst the partners of the dissolved firm. The principle found acceptance in *Yates v. Finn*, (1880) 13 Ch. D 839 and would apply in all cases where the partnership property fetched fair profits and was sold within a reasonable time. In *Ahmad Musaji v. Hashim Ebrahim*, 42 Ind. App. 91 their Lordships instead of allowing profits allowed interest for the period during which the division of the partnership property was withheld. Section 16, Partnership Act, insists that a partner who makes profits out of the partnership property must make them good to the firm. The appellant's proposition would cast a duty on a partner who retains the stock either to preserve it or to produce it when called upon to do so by others. There is neither principle nor authority in favour of the course advocated. Section 46, it would be recalled, enjoins that the

properties must be sold and if a partner retains them and disregards the law, he is liable to pay interest as held in the Privy Council case referred to above. The delay in selling the cloth has augmented the value considerably. The correct view, therefore, is that the parties rights and liabilities should be determined in accordance with account (B) that is with reference to the prices actually realized by the defendant or those which he should be deemed to have realized when the sale was made.

5. The amount due to the plaintiff-appellant according to account (B) was only Rs. 55-2 9. The lower Court has given him a decree for more than what was due to, him but as the defendant has not appealed, the decree must stand.

6. I would dismiss the appeal with costs. The stay order dated 28-11-1946, is vacated.

Ghulam Hasan, J.

7. I agree in dismissing the appeal.