

Supreme Court of India

Narayanlal Bansilal Pittie. vs Tarabai Motilal (Dead) By Lrs. on 15 October, 1970

Equivalent citations: (1970) 3 SCC 293, 1971 III UJ 70 SC

Author: J Shah

Bench: A Grover, J Shah

JUDGMENT J.C. Shah, J.

1. Narayanlal Bansilal Pittie hereinafter called 'Pittie' was the son-in-law of Tarabai widow of Motilal. Tarabai carried on business in cotton, cotton-seed and cotton bales in the name and style of Narayandas Chunilal in Bombay and also in Jalna within the former State of Hyderabad. Tarabai instituted suit No. 7 of 1354 Fasli in the Court of the Sadar Adalat' Aurangabad, against Pittie for a decree for Rs. 2,84,308/- alleging that she, Pittie & one Chogmal entered into a partnership to carry on business at Jalna in cotton, cotton-seed and cotton bales for a period of five years Samvat Years 1982 to 1986, that her share in the profit and loss was six annas in a rupee, of Pittie six annas, and of Chogmal four annas; that the transactions of the partnership resulted in a profit of Rs. 5,257-12-9 in the first year, and in a profit of Rs. 27 047-13-6 in the second year, that in the next three years the partnership suffered heavy losses and after giving credit for the profits earned in the first years the total loss suffered by the partnership was Rs. 2,08,960/-, that Chogmal represented that he was unable to pay his share of loss amounting to Rs. 52,000/-odd and it was mutually agreed that he should pay Rs. 21,317-7-0 only and balance of the loss of Rs. 1,87,642-9-0 should be borne in two equal shares by her and Pittie, that on that account Pittie was liable to pay Rs. 93,827-4-6 with interest at the rate of 12 annas per mensem, that on Kartik Vad 15, Samvat 1987 the amounts which were to be contributed by her and Pittie were removed from the partnership account and were debited to their respective personal ledgers and the partnership was dissolved; that she paid the entire amount of loss suffered by the partnership and was on that account entitled to recover from Pittie his share of Rs. 93,827-4-6 agreed to be paid by him with interest at the rate of 12 annas per cent, per mensem, that in 1945 Rs. 2,84,308/- were due by Pittie on account, and that he failed and neglected to pay the same in spite of repeated demands. It was claimed in the plaint that the cause of action for the suit arose when partnership was dissolved and Pittie agreed to pay his share of the loss as settled by mutual agreement, and since Pittie had a permanent place of residence in Bombay which qua the State of Hyderabad at all material times before the institution of the suit was foreign territory the claim was within limitation by virtue of Section 13 of the Hyderabad Limitation Act.

2. Pittie by his written statement denied that there was a partnership agreement for five years as alleged by Tarabai. He contended that he had entered into a partnership agreement with Tarabai and Chogmal to carry on business in cotton, cotton-seed and cotton bales for Samvat Year 1982 and that the partnership agreement was by mutual agreement extended for Samvat Year 1983. Pittie denied that the transactions after Samvat Year 1983 were of the partnership and contended that in any event the suit was barred by the law of limitation for he was a permanent resident of the State of Hyderabad and was at all relevant times residing in Hyderabad. He denied the settlement of account dated Kartic Vadi 15, 1961. He contended that no account was ever sent to him and that no demand was made of him and the claim made against him was false and frivolous and was filed after he had filed a suit against Tarabai in the High Court of Bombay in respect of the amount of Rs. 5,63,821-5-3 due at the foot of a mutual, open and current account which suit was settled on February 2, 1944,

and Tarabai agreed to pay and did pay Rs. 5,21,906/- in two instalments. He also contended that in view of the consent decree passed in the suit filed by him in the High Court of Bombay in which suit Tarabai had not raised any contention about her claim was barred as res judicata.

3. Tarabai filed a reply to the written statement and accepted the case of Pittie that the original agreement of partnership was for one year and that it was extended for another year. She alleged however that after the expiry of the second year, it was agreed between Pittie, Chogmal and herself that the partnership agreement should be continued for three years more and that accordingly the partnership was not dissolved at the end of the second year. She denied that the suit was false or frivolous or that it was barred as res judicata.

4. Tarabai died during the pendency of the suit. The suit was prosecuted by her adopted son Vijay Kumar and her daughters. During the pendency of the suit the State of Hyderabad merged with the Union of India. The territory of Marathwada in which the town of Jalna is situate became part of the State of Bombay under the States Reorganisation Act, 1956.

5. The subordinate Judge, Aurangabad dismissed the suit holding that it was barred as res judicata. In this view Tarabai might and ought to have raised in the suit filed on the original side of the High Court of Bombay by Pittie her claim to recover the amount claimed by her, and especially in the counterclaim made by her, and since she failed and neglected to do so, her suit filed in the Court of the Subordinate Judge, Aurangabad was barred. This judgment was set aside by the High Court of Bombay in Appeal No. 697 of 1961, and the suit was remanded to the Subordinate Judge for trial. The Trial Court again dismissed the suit holding that Tarabai failed to prove that the partnership agreement was by mutual consent extended for a period of three years after the first two years. Against the decree passed by the Trial Court dismissing her suit, Tarabai appealed to the High Court of Bombay. The High Court reversed the decree passed by the Trial Court. In the view of the High Court "taking an over all view of the entire", it must be held that Tarabai had established her case that the partnership agreement was extended by mutual agreement till the end of Samvat year 1987, and that accounts were made up and Pittie had agreed to pay Rs. 93,827-4-6 as his share of the loss. The High Court held that the claim was, because of Section 13 of the Hyderabad Limitation Act, not barred. The Court, however, refused to award to Tarabai any interest prior to the date of the suit, and passed a decree of Rs. 93,827-4-6 with interest at the rate of 6% per annum from the date of the suit, i. e. January 4, 1945 till the date of decree, and interest on judgment at 6% per annum from the date of the decree until realization. With certificate granted by the High Court this appeal has been preferred by Pittie.

6. Pittie had filed on the original side of the High Court of Bombay Summary Suit No. 837 of 1943 against Tarabai claiming that at the foot of a mutual, open and current account between him and the firm of Narayandas Chunilal represented by Tarabai in respect of certain commercial transactions at the end of Maru year 1999 there was due to him a sum of Rs. 5,69,338-11-9 and interest amounting to Rs. 69,258-0-3 and that he was entitled to recover that amount with interest at 6% per annum and costs of the suit. Tarabai obtained unconditional leave to defend the suit. She denied in her written statement that there existed between the firm of Narayandas Chunilal and Pittie any mutual, open and current account. She alleged that on or about June 20, 1940, she requested Pittie to

advance Rs. 60,000/- to her, that Pittie insisted upon security for repayment of the sum as also the general balance that might from time to time be found due by her to him, that on or about June 20, 1940, she deposited with Pittie's firm at Bombay tile deeds of her immoveable property situate at Kudchi in District Belgaum to secure repayment of the loan of Rs. 60,000/- and the amount that may be found due by her to Pittie's firm from time to time at the foot of the account, that Pittie demanded from her payment of the amounts that became due to him and that on December 22, 1942 it was agreed between the parties at Bombay that she should pay towards "the amount due at the foot of the fresh Khata No. III a sum of Rs. 15,000/- every month and after the same was fully paid Pittie should return to her the title deeds in respect of the Kudchi property", that pursuant to the agreement she sent to Pittie from time to time four demand drafts of Rs. 15,000/- each which were duly received by Pittie and that she was at all times material to the suit ready and willing to comply with and carry out the terms of the agreement and that she had not committed any default in payment of any of the instalments under the agreement. Accordingly as a counter-claim, to the suit Tarabai pleaded that she was entitled to recover from Pittie the title deeds deposited with him in the event of the Court holding that Pittie was not bound to resale the said securities.

7. Suit No. 837 of 1943 was settled out of Court. On February 2, 1944, the terms of the settlement were recorded. Tarabai admitted liability for Rs. 5,21,907/- and interest thereon at the rate of 6% per annum from February 1, 1944, and another sum of Rs. 1,11-6-0 for interest on khata No. 2. Tarabai admitted that she had paid to Pittie a sum of Rs. 1,40,000/- in part payment of the amount due and had also given a cheque for Rs. 1,11-6-0 in full payment of the interest in Khata No. 2, and she agreed to pay the balance of Rs. 3,81,906/- and interest from February 1, 1944 at 6% per annum thereon, and Rs. 7,000/- for costs of the suit and of the counter-claim on or before October 2, 1944. It was stipulated that in the event of Tarabai failing to pay the amount of Rs. 3,81,906/-, interest and costs on or before October 2, 1944, Pittie shall be entitled to a decree and Tarabai shall submit to a decree in favour of Pittie on the terms set out in the settlement, that the counter-claim shall stand dismissed, and that the four factories including the machinery to which the title-deeds deposited related shall remain as security for payment of the amount admitted to be due by Tarabai.

8. Tarabai paid the full amount due by her under the decree in Suit No. 837 of 1943. Neither in the written statement filed in the suit, nor in the course of negotiations for settlement of Pittie's claim was any plea set up that Tarabai was a creditor of Pittie for the amount agreed to be paid by him on settlement of the partnership account. She made no counter-claim in the suit filed by Pittie. She admitted liability to pay Rs. 5,21,906/- without apparently setting up even a demand in respect of the amount which she has claimed in this suit. The conduct of Tarabai in agreeing to pay a large sum of money and in fact paying it without insisting upon settlement of her claim against Pittie in respect of the partnership transactions has great significance in considering the oral and documentary evidence relied upon by the plaintiff.

9. In the plaint as originally filed, it was alleged that the partnership was to continue for five years. Pittie in his written statement relied upon his letter dated November 13, 1927 which expressly recited that he did not desire to continue the partnership. Tarabai by her reply accepted the case of Pittie that the duration of the partnership was to be originally one year, and that it was extended by another year by mutual agreement. She pleaded that by an arrangement reached between the three

partners the partnership was extended for three years. This case set up in the reply to Pittie's written statement was not supported by any documentary evidence. Again in respect of the alleged settlement of accounts after the expiry of three years under which it is the case of Tarabai that Pittie had agreed to pay Rs. 93,827-4-6 also there is no written record. It is common ground that no separate books of account were maintained by the partnership, but the transactions were entered in the books of account maintained by Tarabai's firm Narayandas Chunilal and the final liability pursuant to the alleged settlement of account was transferred to the journal as the last entry for the year. This entry could be posted in the journal at any time before the suit.

10. The Trial Court disbelieved the story set up in the plaint and modified in the rejoinder. On a review of the evidence the Trial Court observed that Tarabai's case that there was a fresh agreement after the expiry of the second year for continuing the partnership for three years more could not be accepted as true. The High Court, however, accepted the case, disagreeing with the view of the Trial Court. It is necessary to closely scrutinise the circumstances and the oral evidence in the light of the documentary evidence.

11. It is common ground that there was a partnership between Tarabai, Pittie and Chogmal which lasted for two years. Correspondence in this connection may be briefly noticed.

12. By letter dated October 21, 1925, Pittie proposed certain conditions on which he was willing to enter into the proposed partnership. These conditions were that the share of Pittie in the profit and loss will be six annas in the rupee, that of Tarabai will be six annas and of Chogmal four annas in the rupee; that Pittie will invest a sum of Rs. 50,000/- for which he will charge interest at the rate of eight annas per cent and if any additional sum was invested interest will be charged at the rate of 12 annas percent, per mensem; that expense of one of his employees will be borne by the partnership and that he shall be entitled to inspect the books of account of the partnership including the ledgers; that information with regard to daily purchases and sales affected shall be sent by letters and telegrams; that the partnership shall be restricted to Jalna and shall be in cotton, kardi & kapas; & that the extent of the business shall not exceed Rs. 2 lakhs and goods exceeding Rs. 2 lakhs in value should not be purchased at one time By letter dated October 25, 1925 in the hand of Chogmal, Tarabai and Chogmal agreed to the conditions This letter shows that even though no formal deed was executed, all the terms of the partnership were recorded in writing.

13. On November 24, 1926 Pittie addressed a letter to Tarabai stating that in the previous year he had done business in cotton in partnership with the firm of Narayandas Chunilal accounts whereof had not been sent to him. He enquired whether Tarabai intended to do business in partnership in the year Samvat 1983, and if so on what terms ? In reply to that letter Chogmal wrote that the accounts could not be sent because there was some stock of cotton seed lying with the firm, and that "it was better to carry on the business in the same manner as last year". By letter dated November 29, 1926 Pittie wrote to Tarabai that the partnership should be continued on the same terms as the previous year. Pittie complained that no statement of account had so far been received and he demanded that the statement of account be sent immediately.

14. By his letter dated November 11, 1927 Pittie wrote:

II. We had dealings in partnership with you at Jalna for the past two years, but have so far not sent accounts nor intimated the profit or loss which should be done forthwith.

III. This year we do not intend to do business in partnership with you which please note.

In reply there to Chogmal wrote to Pittie on November 13, 1927 that:

We note that you want us to send you a list of parties here. X X X At present there is no body to take money from you. The rainfall has been heavy at all places in our district and it is difficult to say anything at present. At present there is no such business for which you could send an employee. XX We note that you do not intend to do business this year. We have written to Bombay. Please settle the same there. We have noted what you wrote about accounts. The accounts will be ready in 15 days By then the small quantity of cotton seeds left will sold and the accounts will be finalised.

The two letters dated November 11, 1927 and November 13, 1927 leave no room for doubt that Pittie was unwilling to carry on the business after the end of Samvat year 1983. But witnesses were examined to support the case that Tarabai, Pittie and Chogmal reached an agreement extending the partnership for three years. These witnesses are Goverdhandas Jamriadas, and Mohanlal Nathmal.

15. Goverdhandas said that he was serving as a munim in the firm of Narayandas Chunilal conducted by Tarabai between the years 1922 and 1933; that he was serving in Bombay and was looking after the business dealings of the firm at various places in the Bombay province and in the Hyderabad State; that in Samvat year 1982 Chogmal, Tarabai and Pittie were partners in the business of the firm at Jalna and that the partnership which was limited to transactions in cotton, cotton-seed and cotton bales at Jalna continued for a period of five years; that the partnership agreement was initially for one year and it was extended by one year; that thereafter there was an extension of the partnership agreement for three years; that Pittie had addressed a letter in 1927 to Jalna shop of the firm of Narayandas Chunilal intimating his unwillingness to remain a partner, but that thereafter in a meeting between Tarabai and Pittie at Tarabai's residence in Bombay, it was agreed that the partnership on the original terms and with the same partners shall continue for three years more and accordingly the business of the firm continued at Jalna for three years upto Sharwan Samvat 1987 The witness then stated that Chogmal the third partner insisted that the accounts of the partnership be settled, that accounts were made in the presence of the three partners and copies of the accounts were given to the three partners, and Tarabai was explained he accounts; that the amount of loss failing to the share of Ghogmal exceeded Rs. 50,000/- and as he expressed his inability to pay that amount it was agreed in the presence of the witness that an amount of Rs. 21,000/- odd shall be borne by Ghogmal and the balance of the loss shall be borne by Pittie and Tarabai in equal shares. In cross-examination the witness stated that the accounts were scrutinised at Jalna for 5 or 6 days and during that time Pittie was also staying at Jalna but there was no talk about the accounts between Tarabai's firm and the Hyderabad concern of Pittie at that time. He stated that beside him only Pittie and Tarabai were present at the time when accounts were made. According to the witness, accounts were settled and the copies of the account disclosing the total losses were given to the three partners. But in token of that receipt no writing was taken from any partner. He also stated that there was no writing about the debiting of losses in pursuance of the

arrangement and that the talks went on for two days in Bombay in the residential house of Tarabai and thereafter Ghogmal executed a mortgage in favour of Tarabai in respect of his property to the extent of the losses suffered by him, but there was no agreement in writing about the extension of the term of the partnership agreement. He admitted that Pittie had sent a letter complaining at the end of the second year that as Tarabai's firm did not submit a statement of account of the partnership dealings he did not desire to continue in the partnership. The witness then stated that he was asked by Tarabai to give the statements of account regularly and he supplied the statements of account to Pittie three or four months later.

16. Witness Mohanlal stated that the partnership between Tarabai, Pittie and Chogmal continued for a period of five years. He deposed to the details of the profit and loss suffered by the partnership year after year, and stated that the amounts of losses were debited separately against the personal khata of the parties. According to the entry this was done on the instructions of Tarabai by opening a fresh account. In cross-examination he stated that he was not present at the time of settlement of accounts at Jalna nor at Bombay. He said that he came to know about the entries a fortnight after they were made.

17. Tarabai died many years before the suit came up for trial. Chogmal the other partner was not examined. There was no agreement of partnership in writing. There was no written record of the extension of the partnership as was set up in the reply to the written statement. There was no correspondence between the parties evidencing the settlement of accounts and extension of the partnership. The case of extension of the agreement of partnership after Samvat Year 1983 was not set up in the plaint as originally filed & was set up to meet by way of a reply to the letter dated November 13, 1927, disclosed by Pittie and was sought to be supported by oral evidence of Goverdhandas. He is the only person who speaks about the partnership agreement and its extension at the end of Samvat year 1983. He said that the accounts were prepared and copies of statements of account were sent to the partners. In respect of this settlement no attempt was made to take the signatures of the contracting parties in acknowledgement of their correctness. Under the settlement, according to the plaintiff Pittie and Tarabai agreed to discharge a part of the liability of Chogmal. No attempt was made at the trial to tender in evidence the statement of account alleged to have been prepared at the settlement. No attempt was made even to tender in evidence the mortgage deed obtained from Chogmal which it was claimed was in satisfaction of liability for a part of the loss suffered by him. The parties though closely related were accustomed to do business transactions and invested them with some formality. They were living at different places, and during the course of Samvat Year 1982 and 1983 when the partnership was admittedly subsisting there was correspondence in relation to its dealings. After November 13, 1927 there is complete absence of correspondence. Not even a letter was addressed to Pittie by Tarabai, demanding the amount claimed to be due to her. There is no evidence that any statement of account was sent from Jalna to Bombay in respect of the partnership after the alleged settlement. The partnership did not maintain separate books of account entries were posed only in the books of account of the Jalna firm of Narayandas Chunilal, for, it was only in respect of the cotton, cotton-seeds and cotton bales transactions in which the defendant Pittie was a partner.

18. Conduct of Tarabai between 1930 and 1915 also throws a great doubt upon the veracity of her claim. If Pittie was liable in a sum of Rs. 93,827-4-6 payable with interest at the rate of 12 annas per cent per mensem there would have been a demand made in writing during a period of 15 years which elapsed before the suit was filed. It is admitted on all hands that no such demand was ever made. In 1943 Pittie filed a suit against Tarabai in the High Court of Bombay claiming a sum exceeding Rs. 6 lakhs at the foot of a mutual, open and current account in respect of transactions between Pittie's firm and the firm of Narayandas Chunilal conducted by Tarabai. In the lengthy written statement filed in the suit and the counter-claim any reference to Tarabai's claim is singularly lacking.

19. A clinching circumstance is that Tarabai made no claim, when the parties negotiated a settlement of the suit filed by Pittie on the mutual, open and current account, and paid the amount settled in two instalments without demanding that her claim against Pittie may be given credit for. If there was truth in the story of Tarabai and Pittie had agreed to pay Rs. 93,827-4-6 with interest, such a claim could naturally have been made in the course of the settlement. The conduct of Tarabai and the great delay in institution of the suit coupled with the absence of any documentary evidence which may even indirectly support the case of the plaintiffs raise great doubt upon the truth of the story set up in her plaint.

20. Counsel for the plaintiffs said that Tarabai did not make a counterclaim in the Bombay suit for her dues in respect of the partnership because she was advised that under the Indian Limitation Act, 1908, applicable to the counter-claim filed in Bombay the claim for Rs. 93,827-4-6 if made by Tarabai was barred. That contention may be technically correct, but there is no reason why a reference should not have been made in the written statement or the counter-claim that there was such a claim in respect of which Tarabai intended to take proceedings in the appropriate Court where the claim may be within limitation. In any case, there is no reason for not insisting upon settlement of that claim when negotiations were held in respect of the claim made in the Bombay suit. On February 2, 1914 the suit was agreed to be settled and it was one of the terms that it should not be disposed of till the date of the second instalment. Tarabai would naturally have, if there was any truth in her claim, set up her claim at one or more of the various stages of the suit, but that was not done.

21. Counsel for the plaintiffs submitted that Pittie did not enter the witness box to deny the claim made in the plaint and he examined no witnesses in support of his defence nor did he produce his books of account to support his case. Counsel urged that even on the case of Pittie the partnership had earned in the first two years profit and in respect of that profit no claim was made by Pittie at any time. That conduct according to Counsel for the plaintiffs supports Tarabai's claim that the profit was wiped out by the losses suffered by the partnership in the later three years. On behalf of Pittie it is urged that he could not give evidence due to ill health. Pittie had applied before the Trial Court that he be examined on commission, because he had suffered a coronary attack. The application made by him at the trial was rejected by the Civil Judge. In his application dated April 18, 1961 Pittie stated that his case was fixed on April 18, 1961, for evidence of the parties and the parties were ordered to call for their witnesses and keep them present on that date, but Tarabai had not called any witnesses and it was therefore difficult for him to consider whether he was required to

tender any rebuttal evidence since the burden of proof was wholly on Tarabai. He further stated that he desired to give evidence in Court, but as he was "sick and bedridden since last three months and was under the treatment of doctors" he was not in a position to undergo journey from Bombay to Aurangabad, and he prayed that he should be examined on commission. The application was supported by a "certificate" of a leading physician in Bombay who stated that Pittie "was under treatment for heart and blood pressure, and for the sake of his health he had been advised to stay in Bombay for 2 months for rest and treatment". The application filed by Pittie was rejected by the Court.

22. On November 21, 1962 when the case was on board for hearing before the Court, Pittie applied for an adjournment on the ground that as his nephew Madanlal son of Govindlal had died a few days before that date at Bombay, he could not come to Aurangabad from Bombay to give evidence and he therefore prayed that the case may be adjourned for three weeks. The application was supported by a letter addressed by Pittie to his lawyer. This application was rejected by the Court and the case was heard. We do not think that Pittie's absence from the witness box was deliberate. He was unable on account of circumstances beyond his control to remain present in the Court to be examined.

23. The contention that Pittie had not produced his books of account is not accurate. The lawyer for the plaintiffs was given an opportunity to inspect Pittie's books, under the order of the Court. It is true that the inspection was restricted to the question whether Pittie was between 1930 and 1945 in the Hyderabad State. The order related primarily to the bar of limitation pleaded by Pittie. The books of account were inspected by the plaintiff's and were available in Court. It is not the case of the plaintiffs that there was any khata in the books of account of Pittie which related to the partnership account.

24. It is true that an amount of Rs. 32,000/- odd was the profit of partnership earned during the first two Samvat Years 1982 and 1983 and approximately an amount of Rs. 12,000/- was earned by Pittie. There is no clear evidence on record why Pittie did not make a demand. But from this circumstance alone, we are unable to infer that the partnership was continued after Samvat Year 1983 and the profit payable to Pittie for the first two years was set off against losses suffered by the partnership in the subsequent three years.

25. We have carefully considered the evidence on the record and we are of the view that the High Court was in error in holding that the settlement alleged between Tarabai and Pittie in November 1927 in which Pittie agreed to continue to remain a partner in the business of the Jalna firm to the extent to which it related to the business in cotton, cotton-seed and cotton bales and that he agreed to pay in November 1930 Rs. 93,827-4-6, is not proved.

26. The appeal is allowed. The decree passed by the High Court is set aside and the decree passed by the Trial Court is restored. Having regard however to the circumstances of the case, we think the parties should bear their own costs in this Court and in the High Court.