Privy Council Appeal No. 128 *of* 1920.

K. Gopala Chetty, since deceased, and another - - - *Appellants*

v.

T. G. Vijayaraghavachariar - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH, 1922.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PHILLIMORE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

About the year 1908 a partnership was formed between Narasimhachariar, the respondent Vijayaraghavachariar, the appellant Gopala now deceased and the appellant Ethirajulu, who for the purposes of this appeal also represents the first appellant. Narasimhachariar having died in 1911, a suit was filed on the 15th November, 1913, in the High Court at Madras by his adopted son against the respondent and the two appellants, praying for partnership accounts, and payment to him of his adopted father's share. The plaintiff in this suit was, in some manner not now important to consider, settled with, and retired from the suit and by an order of the High Court the respondent was transposed from his position as defendant and became plaintiff, continuing the suit against the other defendants, the present appellants.

The suit came on for hearing before a Judge of the High Court on the 26th February, 1915, when it was found that the partnership had been dissolved before the death of Narasimhachariar, namely in April, 1910, and that therefore the suit was barred by article 106 of Schedule I of the Indian Limitation Act, 1908,

which provides that a suit for accounts and a share of the profits of a dissolved partnership must be brought within three years of the date of dissolution. The respondent did not appeal. But on the 30th April of the same year he launched a second suit against the present appellants, which is now in question before their Lordships.

In this suit, after setting out the proceedings in the previous suit and admitting that he had become disentitled to claim a general account and the payment to him of what might be found due and payable on the taking of a general account, he said that the sum of Rs. 18,842 had been received by the appellants in various payments on various dates from debtors to the old firm, and he claimed his quarter share in this total sum. The appellants put in a written statement in which they denied that they had received any assets of the firm, said that if the accounts were to be taken the respondent would be found to be indebted to the firm, pleaded the Indian Limitation Act, and that the suit was barred by *res judicata* and certain other defences. The suit was tried before Kumaraswami Sastriar J., who gave judgment on the 27th March, 1916, deciding the bulk of the issues in favour of the plaintiff, now respondent, and giving him a declaration that he was entitled to a quarter share of the amount claimed and ordering an account to be taken with a view to showing whether there was any set off in respect of sums which might be due from the respondent to the appellants. By the schedule of the decree it appeared that approximately Rs. 11,000 of the sum claimed had been received before the institution of the first suit, and the whole of the balance before the decree in the first suit. The learned Judge held that though a general partnership account was barred by the Indian Limitation Act and by the decision in the first suit, there was nevertheless a right in a partner to sue his other partners for his share of the assets of the partnership, for which the period of limitation would be six years and not three ; and that, therefore, the second suit had been brought in time. The learned Judge came to this conclusion on the authority of certain cases decided in the High Court of Madras, following earlier decisions in the High Court of Bombay.

The present appellants appealed to the High Court in its appellate jurisdiction. The appeal came on before Sir John Wallis C.J. and Napier J. and was dismissed, the learned Judges saying that they were not prepared to go behind three Madras decisions to the effect that a cause of action arises from the receipt after dissolution of partnership of assets by a former partner.

They observed that these decisions appeared to proceed upon the view that the receipt of assets by a former partner after dissolution gives rise to a fresh cause of action. Otherwise, as they said, it would be quite impossible to distinguish the decision in *Knox* v. *Gye* (L.R. 5 H.L. 656). It is from this dismissal that the present appeal is brought.

Though in the opinion of the appellate Judges the case of *Knox* v. *Gye*, unless it can be distinguished, would destroy the case of the respondent, it so happens that it is upon a reading of certain passages in the speeches of the noble Lords who took part in that judgment that the series of cases in the Bombay and Madras High Courts, upon the authority of which judgment has been given for the respondent, proceed. It is, therefore, important to begin the consideration of the law with a careful analysis of that case.

Gye was lessee of the Covent Garden Theatre and for the purpose of the concern obtained in 1853 a considerable sum of money from one Thistlethwayte on terms of partnership. Thistlethwayte died in 1854, making Knox his executor. Knox in the second bill which he filed (which was the one that came under consideration in the House of Lords) contended that thereafter he and Gye continued the partnership. In 1854 negotiations were entered into with one Hughes for the temporary use of Her Majesty's Theatre, and a sum of £5,000 was paid to Hughes in advance for this purpose. Hughes did not carry out his share of the bargain. Gye sued him for the £5,000 and recovered judgment, but not succeeding in getting the money, he ultimately accepted, in 1862, the sum of £2,500 by way of compromise. In 1856, the Covent Garden Theatre was burnt down and Gye took the Lyceum Theatre. In October, 1864, Knox filed the bill against Gye, praying for accounts from the date of the original advance by Thistlethwayte, for the winding up of the alleged partnership between Gye and Thistlethwayte, that Knox might have his share of the sum advanced by Thistlethwayte, including a share of the money recovered or which ought to have been recovered from Hughes, and a share of the profits of the partnership. The answer set up by Gye in substance pleaded that Thistlethwayte's share was confined to the business of the old theatre, the whole capital of which was lost by the fire ; that Knox was not entitled to any accounts ; that his rights if any arose at law and not in equity ; and that whichever way they arose, the statute of limitation was a good answer.

The Vice Chancellor, Sir William Page Wood, made a decree in favour of Knox, being of opinion that the statute of limitation did not apply, either as regards the money received from Hughes, which he treated as an equitable claim enforceable in equity, or as regards the share of Thistlethwayte in the partnership, the statute being prevented from applying to that part of the claim because of the fiduciary relation between Thistlethwayte and Gye, and by the fact that the money recovered from Hughes was received within six years before the institution of the suit.

On appeal the Lord Chancellor, Lord Chelmsford, reversed this decree. When the case came on for hearing before the House of Lords, the House was composed of Sir William Page Wood, now become Lord Hatherley and Lord Chancellor, Lord Chelmsford and Lords Westbury and Colonsay. At the close of the appellant's case

the House was of opinion that the partnership never extended to the Lyceum business, and counsel for the respondent were directed to confine themselves to the argument upon the statute of limitation. It was apparently considered that if the statute of limitation was to be applied, the right of Knox accrued in December, 1854, upon the death of Thistlethwayte, the partnership being dissolved by his death, and that the bill not being filed till 1864 was out of time ; and with the possible exception of Lord Hatherley, the noble and learned Lords who composed the House held that the receipt of money from Hughes more than six years after the partnership was dissolved did not take the case out of the operation of the statute. If, therefore, the statute was to be applied it constituted a good defence. The matter then remaining for decision was whether this was a case where equity followed the law, and consequently the relief was barred. This was so held, Lord Hatherley dissenting, and the suit was accordingly dismissed.

Now it will be observed that the sum of £2,500 was received within the statutory period, and its receipt was the receipt by Gye of a partnership asset.

The case would seem, therefore, to be in point, and (the suit having been dismissed) adverse to the present respondent. But as the suit was one for a general account and not merely or even by way of addition to recover Knox's share of the sum received from Hughes, and as there are in the speeches of the noble and learned Lords some passages where a case like the present is put by way of hypothesis, the decision in *Knox* v. *Gye* need not be taken for the purposes of the present judgment as laying down a final determination of the law on this point.

Nevertheless the observations in that case when carefully considered do not warrant the construction which has been put upon them by some of the Courts in India, but on the contrary warrant the conclusion to which independently of authority a little clear thinking leads.

Lord Hatherley, for the purposes of his observations, takes the case of a partnership dissolved by death and an account being taken " that everything which could be ascertained had been then ascertained and adjusted, that the account was complete and that releases were given "—releases which as he says " could only go to the extent of the claim that then existed against the surviving partner." He assumes that in that case an asset for which no allowance has been made falls in and is received by the surviving ex-partner ; and he holds that in such a case the executor of the deceased ex-partner could claim his share.

Lord Colonsay with a similar train of thought speaks of a sum of money " unexpectedly recovered."

Lord Chelmsford says : " It was said that upon payment of the debt by Hughes a new right had accrued to the appellant. But the right to sue for what ? The answer must be for an account. But that he was entitled to all along, and the account must have included this very debt of Hughes, the receipt of which is supposed

to have created a new right to an account." It is true that there is later on in his speech some rather vague language which may have led to his having been supposed to take the view that even when partnership accounts cannot be taken a suit may be brought for a specific item ; but the whole tenor of his reasoning shows that he is contemplating the circumstances supposed by Lords Hatherley and Colonsay. Lord Westbury's language is striking—he is not contemplating this particular case, but discussing the effect of the statute of limitation. He says :—

> It will be asked whether the bar by statute can be greater than a release between the parties. In the answer to that question the nature of the release must be required to be stated. If on an account stated a release is given, the release will be limited to that account, and will not bar the right of an executor to have an account of subsequent receipts. But if the release be of the right to an account altogether, then the release will be exactly equivalent to the bar here created by the statute and will bar all right whatever to claim the benefit of any subsequent receipt by the accounting party.

The rule of law then is the following :—

If a partnership has been dissolved and the accounts have been wound up and each partner has paid what he has to contribute to the debts of the partnership and received his share of the profits, the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. There is no reason why one should have it more than the other.

The case will not often occur. If the debt is incurred to the firm and both the ex-partners are alive the debtor can only safely pay upon the receipt of both, for the agency of each for the other has ceased with the dissolution of partnership, and both receiving and being in possession each can insist upon his proper share.

Lord Hatherley points out the most probable occasion when it would arise, namely, when one of the partners is dead and the debt has accrued at law to the surviving partner who thus becomes solely possessed of the former partnership item ; and he says that in such a case the executors of the deceased ex-partner would have a right to recover their testator's share from the ex-partner who has received the whole. It is not so certain that this particular case would arise in India by reason of the provisions of Section 45 of the Indian Contract Act, upon which section apparently different decisions have been given in the several High Courts in India. (See Sir F. Pollock's work on the Indian Contract Act, page 193.) It is, however, possible to conceive of other cases in which this principle might have to be applied. A partner might contract really for the partnership, but apparently as sole principal and in that capacity be the sole recipient of a partnership item.

At any rate, in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership.

If on the other hand no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share. It might well be the case that one of the reasons why no final balancing of accounts took place was that A. owed the partnership so much money and that it was anticipated that B. would hereafter receive a particular item which would operate substantially to balance the claim.

The principle above set forth being reasonably clear and intelligible, it remains for their Lordships to discuss certain decisions in the Indian Courts.

The first case on this matter was *Dayal* v. *Khatav* (12 Bombay High Court Reports, page 97) decided in the year 1875. The judgment in that case rested upon other and incontrovertible grounds, but there were *obiter dicta* in the course of the judgment which no doubt would help the present respondent. These *obiter dicta* were relied upon by Latham J. in *Merwanji* v. *Rustomji* (I.L.R. 6 Bombay, 628), decided in the year 1882. That decision is no doubt in point and in favour of the respondent; but it is to be observed that it was largely based upon the *obiter dicta* in the previous case.

The third Bombay case was *Rivett Carnac* v. *Goculdas* (I.L.R. 20 Bombay, page 15). Candy J. sitting as a single Judge in the first Court criticised the previous Bombay decisions, but said that he was bound by them. Accordingly he held that though a claim for a general partnerhip account was barred by limitation a claim for a share of moneys received by the partnership within the period of limitation was not barred; that the plaintiff was entitled to recover Hemabai's and Gokuldas' shares of the said money; and that the second defendant was entitled to set off against this his share of certain moneys received by the plaintiff as part of the assets of the said partnership. The High Court in appeal held that the respondent's claim to an account of the partnership dealings was not barred by limitation because under Section 17 of the Limitation Act (Act XV of 1877) when a person, who, if living, would have a right to sue, has died, the period of limitation is to be computed from the time when there is a legal representative of such person capable of instituting the necessary suit, and gave the plaintiff a decree for the assets which he claimed. The case came on appeal to His

Majesty in Council in 1898, and is reported as *Bhugwandas Mitharam* v. *Rivett Carnac* (26 L.R. Indian Appeals, page 32). This Board agreed with the decision of the High Court that the claim was not barred by the Limitation Act, but their Lordships thought that the decree given by the High Court was too wide, and directed an account to be taken of the partnership transactions. They made no observations on the particular point now under consideration, and the case may be left out of consideration except to the extent to which it embodies the criticisms of Candy J.

Their Lordships now turn to the Madras cases. In *Sokkanadha* v. *Sokkanadha* (I.L.R. XXVIII Madras, 344), decided on appeal by the High Court in 1904, the decision in *Merwanji* v. *Rustomji* was followed as an authority, and reasons were superadded why in the opinion of the learned Judges it was right. One passage may usefully be quoted :—

> Even on principle it would seem that this conclusion is the better one, for why should the fact that a suit for a general account is no longer maintainable be used to secure to some of the partners exclusively the benefit of realisation of assets made under circumstances which raise no question of limitation with reference to a claim strictly confined to a share of what was realised. Of course, to allow such a claim to be maintained without the defendant being at liberty to go into the whole accounts and if possible defeat the plaintiff's claim by showing that the net balance is against the plaintiff would be quite unjust. The view we follow avoids such undesirable results while it secures to all the partners their fair and proper shares in assets with reference to which no question of lapse of time is capable of being raised under the law.

With great deference this reasoning begs the question. How is it to be known that some of the partners would exclusively benefit by the realisation of assets which come in after dissolution ? To meet this objection the learned Judges assume that accounts may be taken and that they have done enough for the ex-partner who is sued in saying that he may have the accounts taken. But if the policy of the law be that after the period of limitation no accounts shall be taken, for the excellent reason that materials for taking such accounts may have disappeared, it is not legitimate to say to the person sued, " Either pay on the footing that accounts have been taken which we know have not been taken and on the footing that all matters have been squared up between you and your partner when we have no knowledge that there has been any such squaring up, or submit to that taking of accounts against which the legislature has protected you."

Thiruvengada v. *Sadagopa* (34 I.L.R. Madras, page 112), also referred to in the judgment of the High Court in the case now under appeal may be taken to be to the same effect.

On the other hand, the Chief Court of the Punjaub has expressed its inability to follow these cases (Punjaub Records 1910, case 97, page 298).

Their Lordships have no information as to the matter having come before the High Court of Calcutta.

These decisions having been thus analysed appear to rest upon some *obiter dicta* which do not purport to express Indian Law, but are the result of the construction which some learned Judges have put upon the decision of the House of Lords in *Knox* v. *Gye*, and inferences drawn from that decision, and except for the reasoning upon which their Lordships have already commented in *Sokkanadha* v. *Sokkanadha* to have no other basis. As their Lordships have already pointed out the *obiter dicta* in the Bombay High Court are founded upon a misapprehension of what took place in *Knox* v. *Gye*.

The present case is a striking illustration of the mischief which might result from following the conclusion at which the learned Judges in the Court of Appeal have arrived. The very items for which the respondent is now suing were actually items which would have come into the account on his claim against the appellants for a partnership account in the suit in which he failed.

As their Lordships have arrived at this conclusion, it is unnecessary to consider the further point raised on behalf of the appellants that the dismissal of the previous suit constituted the bar of *res judicata*.

Their Lordships will humbly recommend His Majesty that the appeal be allowed and that the suit be dismissed and that the appellants have their costs here and below.

In the Privy Council.

K. GOPALA CHETTY, SINCE DECEASED, AND ANOTHER

v.

T. G. VIJAYARAGHAVACHARIAR.

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