Privy Council Appeals Nos. 101 *to* 106 *of* 1932.

Babu *alias* **Govindoss Krishnadoss** - - - - *Appellant*

v.

The Official Assignee of Madras and others - - - *Respondents*

Same - - - - - - - - *Appellant*

v

Best and Company, Limited - - - - - *Respondents*

Same - - - - - - - - *Appellant*

v.

Parry and Company - - - - - - *Respondents*

Same - - - - - - - - *Appellant*

v.

Best and Company, Limited - - - - - *Respondents*

Same - - - - - - - - *Appellant*

v.

Chaturbhujadoss Khusaldoss and Sons - - - - *Respondents*

Same - - - - - - - - *Appellant*

v.

Sri Raja Rao Venkatakumara Mahipathi Surya Rao Bahadur Garu, Maharaja of Pithapuram - - - - - *Respondent*

Same - - - - - - - - *Appellant*

v.

Same - - - - - - - - *Respondent*

(*Consolidated Appeals.*)

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MAY, 1934.

Present at the Hearing:

LORD THANKERTON.
LORD SALVESEN.
SIR JOHN WALLIS.

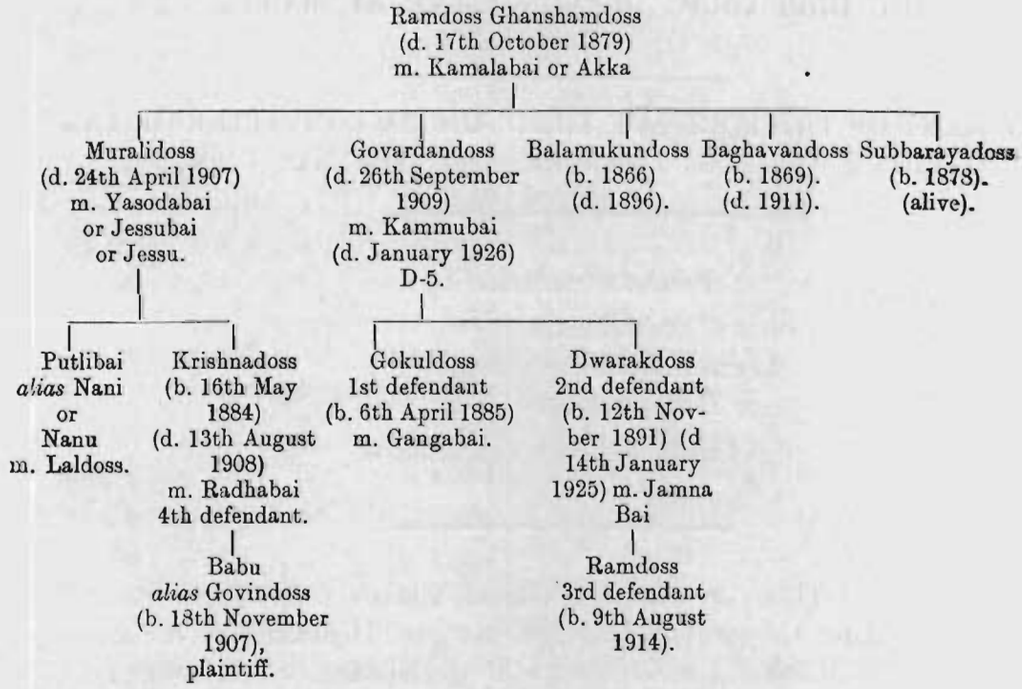
[*Delivered by* LORD THANKERTON.]

These are six consolidated appeals from six decrees all dated the 1st April, 1931, made by the High Court of Judicature at Madras in its civil appellate jurisdiction, which reversed six decrees of different dates made by the same Court in its ordinary original civil jurisdiction. As will be seen later, a decision in the leading appeal (No. 101 of 1932) will, in effect, apply equally in the remaining appeals.

Babu *alias* Govindoss Krishnadoss, who is appellant in all the appeals, was plaintiff in the principal suit (C.S. No. 622 of 1923), which was filed through his next friend Laldoss, his uncle, on account of his then minority, on the 30th August, 1923, and is the subject of the leading appeal. The appellant's father, Krishnadoss, died on the 13th August, 1908, and the main question is whether his father's interest in the business carried on under the name of Muralidoss Ramdoss & Co. was that of a partner or of a member of an undivided Hindu family. If the latter be the correct view, the appeals admittedly fail; if the business was a partnership, a question arises whether the interest of the appellant's father is affected by debts, secured and unsecured, contracted by the firm some years after the date of his father's death, and, if so, to what extent?

The trial Court held that the firm at the time of the death of the appellant's father was an ordinary partnership and that the debts subsequently contracted by the firm did not affect his interest in the firm. On appeal the High Court held that the firm was a joint Hindu family firm; they further held that, even if it was a partnership firm, the interest of the appellant's father in the firm was liable for the debts subsequently contracted.

The following pedigree shows the relationship of the appellant in the family in question and the parties to the principal suit, so far as they are members of the family :—



The following facts may be taken as beyond controversy in the appeal. The appellant's ancestor, Ramdoss Ghanshamdoss, came to Madras and carried on a business in cloth, money-lending and yarn, and acquired landed properties, houses and gold and silver. He died in 1879, leaving five sons, of whom two—

Murali and Govardan—were then major. These two sons carried on the business as the managers of a joint Hundu family business until 1890, by which time their younger brothers Balamukun and Bhagwan had become major, while Subbaraya was still minor. In 1890, as the result of a demand by Balamukun and Bhagwan and their mother, Kamalabai Amma, as guardian of Subbaraya, and submissions by the parties, a panchayat award, dated the 27th September 1890, was made, under which admittedly a partition was effected of the shares of the three younger brothers, and the family business was allotted to the shares of the two elder brothers, Murali and Govardan, the younger brothers ceasing to have any interest therein.

The principal matter of controversy is whether this award left Murali and Govardan as undivided co-parceners or as partners in the business, and, if they were partners, whether there was a subsequent re-union between them. But, without prejudice to these questions, it is the fact that they carried on the business until 1906 when their respective sons, Krishna and Gokul, were assumed into active management, and thereafter it was carried on by them and the survivors until about 1919, or later when the business began to get into difficulties and, ultimately, on the 28th November, 1924, Gokul and Dwarka were adjudicated insolvents. Throughout the whole period from 1879 to this date the business was carried on under the style of Muralidoss Ramdoss & Co.

In the opinion of their Lordships, the first question to be determined is whether the award of 1890 effected a partition between the shares of Murali and Govardan, and that depends on the construction of the award, in regard to which the subsequent actings of the parties is not relevant. Their Lordships agree with the view of this matter taken by the Trial Judge and they are unable to agree with the view expressed by Ramesam J., in which Stone J. concurred. The award itself appears to contain a narrative of every material surrounding circumstance, and it divides the properties into five shares, equal in value but varying in character, and has appended to it receipts for the shares. Their Lordships are clearly of opinion that the award effected a complete partition between each of the five brothers, and they agree with the reasons given by the learned Trial Judge. It follows that Murali and Govardan were left by the award as partners in the business, the interest of each partner being one-half, and the burden of proving that there was a subsequent re-union rests upon the respondents. It may be observed that there is nothing unusual in this particular burden of proof; it means that the evidence of the change from partnership to co-parcenary must be sufficient to satisfy the Court that in fact it took place. It may further be observed that the circumstances of the partition may themselves ease the burden of proof in the sense that they provide a setting not unfavourable to re-union

between certain of the parties to the partition. The present case appears to provide an illustration of this, for the narrative in the award makes clear that the demand for separation came from the three younger brothers, who stated that they would have no concern at all with the profit and loss of the business thereafter, and, while in law the award effected a separation of the interests of Murali and Govardan in the business, it would be natural enough for them to carry it on in fact as a co-parcenary business. If, on the other hand, it had appeared that the partition had originated, at least partly, in the desire of these two brothers to separate, the burden of proof of the change would have been a heavier one.

Bearing in mind that the respondents require to establish by the evidence that a re-union had taken place prior to the death of Krishna on the 13th August, 1908, the documentary evidence between the date of the award of 1890 and the death of Krishna may be first considered. In the first place, there is a series of formal documents, such as plaints, sale-deeds and mortgages, beginning in 1893 and ending with a mortgage deed of the 20th December, 1907, which, with the exception of a mortgage deed of the 4th November, 1907, do not afford any positive evidence in favour of the respondents, but, on the contrary, most of these documents afford positive evidence of co-partnership. But there are two outstanding documents in this period, the first of which consists of public notices by handbills and by advertisement in the "Madras Mail" and the "Fort St. George Gazette," on the 20th to 23rd October, 1906, which informed the public that Krishna and Gokul had been admitted by Murali and Govardan as "partners in our company" from the 19th October, 1906, and that the name of the firm would still be Muralidoss Ramdoss and Company. The other document is a letter addressed by Murali to Krishna and Gokul on the 13th February, 1907, in the following terms :—"My brother Govardandoss is very ill and unable to attend to business ; I am now in a poor state of health and I am advised to take rest. I am desirous of handing over the management of our business to you. You will therefore hereafter conduct the business of the firm of Muralidoss Ramdoss and Company and under the same name. I will if necessary give you any advice you may want till our partnership is dissolved by a proper deed. I will not object to buying and selling goods." The letter is stamped with an eight annas stamp. The reference to the dissolution of their partnership by a proper deed, in their Lordships' opinion, is inconsistent with anything but partnership. The writer of the letter died less than ten weeks later. The subsequent mortgage deed of the 4th November, 1907, will be referred to later.

The remaining documentary evidence consists of a series of account books beginning in 1893, and, with intervals, coming down to about 1909. The various accounts and the entries have been

fully reviewed in the judgments of both the Courts below, and counsel for the respondents submitted an elaborate and able argument on them, but their Lordships are unable to draw any conclusive inferences from them, as they are not kept on any distinct system clearly based on either co-parcenary or partnership.

On the death of Krishna, he was survived by the appellant, then less than a year old, and by Govardan and his sons Gokul and Dwarka, the latter being still minor. These four would then have constituted the joint family alleged by the respondents. There seems to be little doubt that Govardan, who died in September, 1909, was not in a condition fit for active business, and that Gokul really controlled the business from this time onwards, though Dwarka may have been associated with him in it after he became major in the end of 1909. After the death of Govardan the business appears to have been consistently described in formal deeds and plaints as a co-parcenary business, which is in striking contrast to the description in similar documents prior to the death of Krishna, with the exception of the one mortgage deed of the 4th November, 1907, which describes the business as that of a joint Hindu trading family. It appears clearly that the learned Judges of the Appellate Court mainly based their finding of a previous re-union on this particular deed, but, in their Lordships' opinion, such an isolated instance is quite an insufficient support for such a conclusion, unless it were made clear that Krishna was an active party to it. The deed itself refers to a previous mortgage deed of the 5th January, 1907, and wrongly narrates that the parties had been described in the earlier deed as " members of a joint Hindu trading family merchants carrying on business in co-partnership," whereas the actual description was only " merchants carrying on business in co-partnership." It is proved that by the 4th November, 1907, Krishna was already afflicted by the wasting disease from which he died nine months later, and, though he may have been mentally unaffected, it is quite probable that he was not involved in the revisal of this particular deed. It may be further noticed that there is a subsequent mortgage deed of the 20th December, 1907, in which Govardan, Krishna and Gokul are described as the only surviving partners of the firm, and that, after Krishna's death, there is a series of plaints, in which the business was described as a partnership, and which were all amended a month after Govardan's death so as to assert that it was a co-parcenary. If suspicion were a legitimate source of evidence, there is as much room for its consideration in these contemporaneous circumstances, as in the other circumstances to which the learned Judges in the Courts below appear to have attached some importance. Their Lordships desire to observe that, in their opinion, such circumstances as the basis on which the appellant's plaint was originally framed, or the absence of Gokul and Laldoss from the witness box, or the

absence of the accounts from 1890 to 1893, there being no evidence of their being wilfully withheld, are insufficient to overcome the positive evidence afforded by the documents or to prove sufficiently any re-union prior to the death of Krishna.

Their Lordships are of opinion that the respondents have failed to prove any such re-union, and that accordingly, at the time of Krishna's death, the business was a co-partnery, in which Krishna, Govardan and Gokul were partners. The appellant claims that Krishna then held a half share, Govardan and Gokul being each entitled to a one-fourth share. The respondents contended that, the presumption being for equality, Krishna was only entitled to a one-third share. Their Lordships are of opinion that the appellant's view is the correct one. At the death of Murali in the previous year, Krishna became entitled to his share, and, in their Lordships' opinion, the proper inference is that the surviving partners agreed that this share should be left in the business, thus giving Krishna a one-half interest in it. It follows that the appellant is entitled to call the surviving partner, Gokul, who also represents Govardan, the other partner who survived Krishna, to account for Krishna's one-half share as it stood at the latter's death.

In the present suit the appellant seeks to recover a one-half share of *inter alia* certain immovable properties which were owned by the partnership prior to Krishna's death. Certain of the respondents are secured creditors of Gokul, who hold one or more of these properties as part of their security. The other respondents are the Official Assignee of Gokul's estate and certain unsecured creditors of Gokul. The main question is whether the appellant is entitled to have his claim satisfied out of the assets of the dissolved partnership, including the immovable properties in suit in preference to the claims of any creditors, secured or unsecured, in respect of debts incurred by the firm long subsequent to the dissolution of the partnership by the death of his father Krishna, or whether his claim is merely that of a creditor on the insolvent estate of the firm. If the latter be held to be the correct view, the respondents further contended that the appellant's claim fell to be postponed to the claims of the other creditors by virtue of section 262 of the Indian Contract Act.

There being no contract of partnership, the provisions of the Indian Contract Act, 1872, apply to this case without qualification, and the partnership was therefore dissolved by the death of Krishna (section 253, sub-section 10). Provision is made for the winding up of the business so dissolved by section 263, which provides as follows :—" After a dissolution of partnership the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership." In substance this is identical with section 38 of the English Partnership Act

of 1890. As regards the partnership property and its application, the following provisions of the Indian Act are material, viz. :—

> "253.—(1) All partners are joint owners of all property originally brought into the partnership stock or bought with the money belonging to the partnership or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss.
>
> (2) all partners are entitled to share equally in the profits of the partnership business, and must contribute equally towards the losses sustained by the partnership.
>
> 262. Where there are joint debts due from the partnership and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner must be applied in payment of his separate debts, and the surplus (if any) in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm."

These provisions are among the rights and obligations which are continued after dissolution for the purposes of winding up by section 263, and, in their Lordships' opinion, there is no material difference between them and the provisions of sections 24 and 39 of the English Act, except that section 262 of the Indian Act is in more absolute terms than section 39 of the English Act.

The English authorities are fully and carefully reviewed by the learned Trial Judge, and, in their Lordships' opinion, the principle laid down in them is equally applicable to the present case.

It is clear on these authorities that the right of the representatives of the deceased partner is one of property and does not rest merely on contract, and that the surviving partners, who have the right and duty to realise the partnership property, hold a fiduciary relationship towards the deceased partner's representatives as regards his interest in the partnership property, though the latter have no such right in any individual asset of the partnership property as will entitle them to interfere with the surviving partners' right to deal with and dispose of any such asset, for the purpose of realisation. But it must be particularly noted that the surviving partners' right of dealing with and disposing of such asset is limited to the purposes of realisation. The most recent case on the nature of the relationship is *Hugh Stevenson & Sons Ltd.* v. *Aktiengesellschaft fur Cartonnagen-Industrie*, [1918], A.C. 239. It follows that the appellant is entitled to an accounting for the assets of the partnership property free from debts, secured or unsecured, incurred by the surviving partners or partner, except in so far as these were incurred for the purpose of winding up, or so far as the creditors *bona fide* and reasonably believed that they were so incurred. The case of *Langmead's Trusts*, (1855), 20 Beav. 20, 7 De G. M. & G. 353, is not inconsistent with this principle, for in that case the retiring partner

had already received an amount representing his share of the partnership assets, and the only right left to him was a contractual right to have the debts of the dissolved firm paid out of the assets of the firm by his late partner, to whom he had assigned his interest in them. Though the creditor had notice of this arrangement it was held, in view of the lapse of six years, that he was entitled to assume that the firm's debts had been already discharged. That case does not bear on the right of a deceased partner's representative to have an account for such partner's share.

Both the Courts below have rightly regarded the case of *Bourne* v. *Bourne* [1906], 2 Ch. 427, as illustrating the application of the principle in circumstances most analogous to those affecting the secured creditors in the present case, and their Lordships agree with the view of that decision taken by the Trial Judge, but they are unable to accept the view expressed by the High Court. The principle is thus expressed in *Bourne's* case by Romer L.J. :—

> " When a partner dies and the partnership comes to an end, it is not only the right, but the duty, of the surviving partner to realise the assets for the purpose of winding up the partnership affairs, including the payment of the partnership debts. It is true in a general sense the executors or administrators of the deceased partner may be said to have a lien upon the partnership assets in respect of his interest in the partnership on taking the partnership account, but that lien is not one which affects each particular piece of property belonging to the partnership so as to affect that property in the hands of any person dealing with the surviving partner in good faith. It is really what one may call a general lien upon the surplus assets, and does not affect each particular property so as to interfere with the right of the surviving partner to deal with the separate properties belonging to the partnership for the purpose of realisation and to give a good title to persons dealing in good faith with him in respect of those properties. The power of the surviving partner of course extends to a sale, and it also extends to giving a mortgage on any particular part of the property belonging to the partnership to secure in good faith one of the partnership debts."

That statement, in their Lordships' opinion, rightly makes clear that the good faith must be good faith that the transaction is incident to, and for the purpose of, the winding up of the partnership business, and their Lordships are unable to agree with the wider meaning attributed to it by the High Court. In that case the bank was held entitled to retain the security for their account, which had been given to them by the surviving partner, on the ground that they were entitled to consider the debt as a partnership debt. It was the continuation of a partnership account still under the partnership name. Romer L.J., says :—

> " When you find an account of that kind continued—and here it is only continued for something like nine months before the charge is given—the bankers, it appears to me, are entitled, in the absence of evidence showing the contrary, to assume and to be credited with the belief that the surviving partner is continuing it for the purpose of realisation, and that sums paid into that account and sums drawn out of that account in the name of the partnership are paid in and drawn out for the purpose of the partnership."

In the present case, as pointed out by the Trial Judge, the earliest debt, in respect of which any of the respondents hold the properties in security, was not incurred before 1919—eleven years after the dissolution of the firm—and the earliest of these securities was given in November, 1921. Further, these respondents admittedly dealt with Golkul as the manager of a joint Hindu family trading business. It is not possible for any of them, in that view, to suggest that they thought, and had reason to think, that Golkul was incurring the debt and giving the security as the surviving partner of a co-partnery engaged in winding up the business of a firm which had been dissolved in 1908. It follows that the appellant is entitled to have the properties in suit brought into account, free of incumbrances created subsequent to the dissolution of the partnership, along with the other assets of the firm. In this view, the respondents' contention under section 262 of the Contract Act does not arise.

Reference should be made to an alternative ground on which the High Court were prepared to base their decision against the appellant, viz., that the Court was entitled, in the state of the evidence, to infer that, after the death of Krishna, the appellant, though a minor, was admitted to the benefits of the partnership in terms of section 247 of the Indian Contract Act. Ramesam J. states: "We must therefore infer in the absence of any member of the family giving us information on the point that the mother agreed and therefore the other partners admitted him to the benefits of the partnership at any rate." The respondents' counsel was not prepared to support this ground. In their Lordships' opinion, no such inference could legitimately be made from the absence of the appellant's mother from the witness box. Such an act of admission to partnership must be proved, but, in the present case, the possibility of such an act of admission appears to be completely negatived by the evidence as to the joint family basis on which the business was carried on subsequent to the death of Krishna.

On the whole matter their Lordships agree with the conclusions of Venkatasubba Rao J. the Trial Judge, and they will humbly advise His Majesty that the six decrees of the High Court, dated the 1st April, 1931, should be set aside, and that the six decrees of the High Court in its ordinary original civil jurisdiction which were thereby set aside should be restored. The appellant is entitled to his costs in these appeals, and also his costs of the appeals before the High Court in its civil appellate jurisdiction.

In the Privy Council.

BABU *alias* GOVINDOSS KRISHNADOSS

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND OTHERS.

SAME

v.

BEST AND COMPANY, LIMITED.

SAME

v.

PARRY AND COMPANY,

SAME

v.

BEST AND COMPANY, LIMITED.

SAME

v.

CHATURBHUJADOSS KHUSALDOSS AND SONS.

SAME

v.

SRI RAJA RAO VENKATAKUMARA MAHIPATHI SURYA RAO BAHADUR GARU, MAHARAJA OF PITHAPURAM.

SAME

v.

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(*Consolidated Appeals.*)

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