Privy Council Appeal No. 27 of 1945

Sterios Thomopulos and another - - - - - *Appellants*

v.

John Mandilas - - - - - - - - - - *Respondent*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1947

Present at the Hearing:

LORD DU PARCQ
LORD MORTON OF HENRYTON
LORD MACDERMOTT

[*Delivered by* LORD MORTON OF HENRYTON]

This is an appeal from a judgment of the West African Court of Appeal dismissing an appeal from a judgment of the Supreme Court of Nigeria in an action by the respondent against the appellants claiming (1) a declaration that the respondent and the appellants were partners in the firm of S. Thomopulos; (2) dissolution of the partnership; (3) an account of the firm's profits and of the appellant's share thereof; and (4) payment of such share.

Paragraph 1 of the respondent's Statement of Claim was as follows:—

> "By a verbal agreement made in or about March, 1936, the Plaintiff and Defendants became partners in the business carried on at 6, Davies Street, Lagos, and elsewhere in Nigeria, under the firm name of S. Thomopulos, in terms of which 50 per cent. of the profits of the business was to belong to the First Defendant and 25 per cent each to the Plaintiff and the Second Defendant, the losses to be similarly divided."

It was then alleged that the appellants had wilfully and falsely denied the existence of the partnership and had refused to furnish to the respondent an account of "his share in the partnership business". The relief claimed was as set out above. By their Statement of Defence the appellants, in effect, denied that the alleged partnership ever existed and alleged that the respondent was merely an employee who had been dismissed.

The action was tried before the Acting Chief Justice, Baker, J. The respondent gave evidence that from April, 1930, till December, 1935, he and the second appellant were employees in a business of "general trade" carried on by the first appellant. The note of his evidence continues as follows:—

> "Whilst in Ondo at Christmas, 1935, the two Defendants both came and spent Christmas with me. The Second Defendant was then suffering from a disease and his hair was falling out and we decided he should immediately go home and consult some doctors there about the disease. He left Nigeria in 1936. It was also decided amongst the three of us that First Defendant should also go home on leave and on business at the end of the financial year, i.e., 31st March, and I should in the meantime take entire charge of the business. We also discussed at that time after the 31st March the

business should become a partnership from the 1st April, 1936. We decided that First Defendant should take and suffer 50 per cent. of the profits and losses and 25 per cent. to each of us both profits and losses; this we all agreed to. That was all that was discussed at Christmas. In March, 1936, I went to Benin to take stock at Benin with First Defendant. I met First Defendant there . . . . We discussed the partnership and confirmed our Christmas agreement about the partnership."

It is common ground between the parties that no written agreement of partnership was ever drawn up, but their Lordships understand the evidence just quoted as meaning that a verbal agreement for a partnership was made, after discussion, at or about Christmas, 1935, such partnership to commence on 1st April, 1936.

The respondent was cross-examined at some length in regard to various matters, including certain entries in the books and certain statements which he had made, in letters and other documents, tending to show that he continued to be merely an employee, in the business of the first appellant, after 1st April, 1936. He gave his explanation of these entries and statements and he was followed in the witness box by Mr. Frank George Lloyd, an Income Tax official, who produced a letter dated the 22nd November, 1940, from the first appellant to the Commissioner of Income Tax at Lagos. In that letter the first appellant referred to "a balance of £15,448 9s. 11d. of profit made during 1936/37 and 1937/38" and continued—

"Should you decide to tax the amount of £15,448 9s. 11d., and this would be more suitable to me, because it will correspond with my books—the allocation should be made as follows, as regards as my partners are concerned:—

		£	s.	d.
Myself (S. Thomopulos) ...	50 per cent.	7,748	9	11
A. Thomopulos	25 per cent.	3,850	0	0
John Mandilas	25 per cent.	3,850	0	0."

On a profit and loss account for the two years to the 31st March, 1940, which was also produced by Mr. Lloyd, there appeared the words "Partners: S. Thomopulos, A. Thomopulos, J. Mandilas" and it is not disputed that the first appellant wrote these words. Further, on 25th April, 1941, the first appellant wrote a letter to the Bank of British West Africa Ltd. which contained the following passage:—

"*Joint Capital* £12,000.—Owing to faithful co-operation on the part of my brother, Mr. A. Thomopulos, and cousin, Mr. John Mandilas, during the hard times we have passed in 1937/39, I am intending of forming a limited liability company immediately all liabilities of my business are paid, and with this object in mind I have created this account.

For the time being the business is run on the same basis as since 1936, that is to say I am having a share of 50 per cent. and my brother and cousin 25 per cent. each, in the net profits, but all capital, credit balance, etc., in our name are deemed to be working capital in the business, and jointly and severally responsible for all liabilities."

Having regard to the pleadings, one would have expected the first appellant to give evidence denying the existence of any partnership and explaining the documents mentioned above. He was not, however, called as a witness. The second appellant did give evidence, in the course of which he said:—

"I regard myself as an employee and still do so. I have never asked the First Defendant of the payment over to me of any monies. I have never seen the books kept in Lagos. S. Thomopulos is the owner of the business. There was never any meeting amongst the three of us at Benin in 1935 or at Ondo in which partnership was discussed. All our respective families spent our Christmas at Ondo in 1935. We have spent other Christmases together. In March, 1936,

I was in Germany, and on my return there was no mention of any partnership. Plaintiff, my brother and myself have never met at any time to go into the accounts of the business."

He also said that in 1942 his brother " dismissed " the respondent, " telling him he was no more employed in his business ". This story does not accord with the respondent's evidence. The trial Judge said, in regard to the second appellant:—

" I formed a poor impression of this Witness, who would appear to know very little of the business or how the financial part of it was conducted."

He concluded his judgment by saying—

" The Plaintiff as a Witness created a very good impression on my mind, and I believe him when he says a verbal agreement was entered into by the parties to form a partnership commencing at the end of the financial year of 1935; this is supported by the books of the firm, the letter and the return made by the Principal Partner (First Defendant) to the Deputy Commissioner of Income Tax.

The First Defendant did not go into the witness box to deny the partnership and I am satisfied from all the evidence before me that a partnership did in fact exist between the three parties; that the partnership has not been dissolved, and Plaintiff is entitled to have the partnership dissolved, the said dissolution to take place from the date of the service of the writ upon Defendants and in case service was effected at different dates on the two Defendants, then from the date of the last service.

An account of the firm's profits must be taken to ascertain Plaintiff's share therein and payment made to Plaintiff of such share.

Defendants to pay the costs of this action assessed at thirty guineas."

The appellants appealed to the West African Court of Appeal and their appeal was dismissed.

Before their Lordships' Board, Mr. Pritt, for the appellants, contended that there were not concurrent findings of fact in this case. He based this contention upon certain passages in the judgment of the Court of Appeal. That Court reached its conclusion by a line of reasoning which may be open to criticism in some respects, but it is not necessary to examine its reasoning in detail, as their Lordships entirely agree with the conclusion at which the Court of Appeal arrived. Whether there are or are not concurrent findings of fact in this case, their Lordships can see no good reason why the decision of the trial Judge should be disturbed. He arrived at clear and definite findings on questions of fact and there was ample evidence to support these findings. Mr. Pritt suggested that the case put forward by the respondent in his evidence differed from the case put forward in paragraph 1 of his Statement of Claim. It is true that the Statement of Claim refers to a verbal agreement of partnership " made in or about March, 1936 " whereas the respondent deposed to a verbal agreement made in December, 1935, for a partnership to commence after 31st March, 1936, but in their Lordships' view this variation affords no good reason for disturbing the decision of the trial Judge.

Mr. Pritt next submitted that, if a partnership ever existed, it was " an illegal partnership " because the partners never complied with the provisions of the Registration of Business Names Ordinance, 1926. He suggested that as a result of this the Court could not, or should not, entertain a suit by one of the partners for dissolution of the partnership. It is the fact that the firm carried on business in the name of " S. Thomopulos " and the partners never supplied the Registrar with the necessary statement leading to registration. Consequently the firm was never registered in the manner directed by the Ordinance. In their

Lordships' view, however, this omission in no way prevents a partner from obtaining an order for dissolution of the firm. It is not suggested that the business operations of the firm were in themselves of an illegal nature, and the results of non-compliance with the Ordinance are set out in Clauses 8 and 14 thereof. Clause 8 provides for a monetary penalty, and Clause 14 (so far as material) is as follows:—

> "14. Where any firm or person required to furnish a statement of particulars or of any change in particulars makes default in so doing the rights of such defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect of which particulars were required at any time while he is in default shall not be enforceable by action or otherwise.
>
> Provided that—
>
> (*a*) the defaulter may apply to the court for relief against the disability imposed by this section, and the court, on being satisfied that the default was accidental, or due to inadvertence, or some other sufficient cause, or that on other grounds it is just and equitable to grant relief, may grant such relief either generally or as respects any particular contract and on such conditions as the court may impose."

Their Lordships read Clause 14 as referring only to claims made by the defaulting firm against third parties. They can find no provision in the Ordinance which affects the right of one partner in a firm, which has failed to comply with the Ordinance, to bring an action against his co-partners, and they see no reason why any such provision should be implied. Mr. Pritt was unable to cite any authority in support of his contention and in their Lordships' view it cannot be supported. If this contention had been one of some weight, it would have been necessary to consider whether it would be right to allow it to be raised, for the first time, before their Lordships' Board. It was not put forward in the West African Court.

Mr. Pritt then submitted that if any partnership existed, it was a partnership at will, and was dissolved in the year 1942, whereas the writ in the action was not issued till 25th May, 1943. Their Lordships agree that the partnership proved was a partnership at will, but in their view there is no satisfactory evidence which establishes that on any date in the year 1942 any one of the partners gave to each of the other two notice to dissolve the existing partnership.

Nor does it appear that the appellants argued in the Courts in Africa in favour of a dissolution before service of the writ. It is, of course, well settled that service of a writ claiming dissolution operates as a dissolution of a partnership at will and in this, as in other matters, the trial Judge arrived at the right decision.

Mr. Pritt finally suggested that the respondent might have received already more than his share of the profits. That is a matter with which their Lordships cannot deal, and on which they express no opinion. All questions of figures will be dealt with in the taking of the account which has been directed, and no order has yet been made as to the costs of taking that account. No doubt these costs will be dealt with in due course by the appropriate Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondent's costs of this appeal.

(58545) Wt. 8013—20 90 8/47 D.L. G. 338

In the Privy Council

STERIOS THOMOPULOS AND ANOTHER

v.

JOHN MANDILAS

DELIVERED BY LORD MORTON OF HENRYTON

Printed by His Majesty's Stationery Office Press,
Drury Lane, W.C.2.

1947