

32,1955

No. 26 of 1954.

In the Privy Council.

ON APPEAL
FROM THE SUPREME COURT OF CYPRUS.

UNIVERSITY OF LONDON
W.C. 1

25 OCT 1958

INSTITUTE OF ADVANCED
LEGAL STUDIES

44811

BETWEEN:

- A. THE FIRM OF A. G. PATIKI & CO., of Limassol;
 B. (1) IOANNIS G. PATIKI; (2) VASILIOS G. PATIKI; (3) CHRISTOS A. PATIKI; and (4) CONSTANTINOS A. PATIKI of Limassol as partners of the firm A. G. PATIKI & CO., of Limassol and/or personally - (Defendants) *Appellants*

— and —

DEMETRA GEORGHIOU PATIKI of Athens,
 minor by her next friend and judicial and natural
 guardian THRASYVOULOS PAPALOPOULOS
 of Karditsa - - - - (Plaintiff) *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

1. This is an appeal, pursuant to leave granted by the Supreme Court of Cyprus, brought by the above-named Appellants against a judgment of the said Supreme Court (Hallinan, C.J. and Griffith Williams J.) dated the 22nd January, 1954, in part affirming and in part varying a judgment of the District Court of Limassol (Zannetides, President, and Theocharides, D.J.) dated the 28th February, 1953. pp. 53-68. pp. 32-44.

10 2. The Respondent is the adopted daughter of Georghios A. Patiki deceased, a Greek subject domiciled in Greece who died intestate in Greece on the 5th June, 1946. The Respondent, as the Appellants now admit, is the sole heir of the deceased and is entitled to inherit all the movable property in Cyprus of the said deceased.

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3. The said deceased was at the date of his death and had been since 1923 in partnership with the Appellants B. (1), (2), (3) and (4) in the Appellant firm. It is now admitted by the Appellants that the movable property of the said deceased in Cyprus includes the share of the deceased in the partnership assets both movable and immovable.

4. The questions which arise for decision in this appeal are:—

(a) Whether the action instituted by the Respondent against the Appellants in the District Court of Limassol was defective for want of joinder of a legal personal representative of the said deceased. 10

(b) The manner in which the share of the deceased in the assets of the partnership is to be ascertained.

(c) Whether and to what extent the share of the deceased in the net assets of the partnership is to be reduced by a proportion of a total of £35,000 appearing in the Accounts of the partnership under the heading of Reserves.

(d) Whether the Respondent is entitled to interest at the rate of 9 per cent. per annum or some other rate from the 5th June, 1946, on the amount of the said share of the deceased in the partnership assets. 20

pp. 73-5.

5. The partnership agreement between the said deceased and the Appellants B. (1), (2), (3) and (4) is dated the 15th September, 1923, and provides *inter alia*:—

p. 73, 1.19.

“(D) The duration of this partnership is fixed for a period of five years from the 1st July, 1923 Provided however that the partnership may be continued after the lapse of the five year period either expressly or tacitly, on the same terms as are provided in the whole of this agreement.

p. 73, 1.28.

“(F) The Company will keep regular commercial books in which will be entered all the transactions concerning the company and the partners. These books will be balanced and closed every year on the 1st July and/or every six months and the profits and loss of the Company will be determined. This profit and loss will be divided equally among the partners in equal shares and irrespective of the amount of the capital of each one 30

p. 74, 1.15.

“(K) After the expiration of the duration of the present contract, should one or more of the partners wish to retire from the company they shall give notice thereof in writing to the other partners at least three months earlier after the expiration of which the books of the company shall be closed and the retiring partner or partners shall be paid every sum they will be entitled to 40

10 in accordance with these books, less fifteen per cent, on his allotted share of the credits to third persons deriving from goods and tobacco and less ten per cent. on the existing goods, but the retiring partner or partners shall not be entitled to raise a claim for damages for their share with the firm name, the trade marks and good will of the Company. It is understood that the foregoing shall apply in case the other partners wish to continue the operations for their account otherwise the retiring partner or partners can apply only for the dissolution of the Company. The provisions of this clause shall apply also in the case of the death of one or more partners at or after the expiration of the present contract in respect of his or their heirs who shall be entitled to ask either that they may retire from the Company or, in the case of non-acceptance by the other partners, that the Company be dissolved. In no case, however, will such heirs be entitled to step into the shoes of the deceased partner."

6. At the time of the death of the deceased, the accounts of the partnership had been made up for the period to the 31st December, 1945. In balancing the accounts for this period certain assets were carried in, as had been the practice of the partnership, at book value. Further, in balancing the accounts a sum of £35,000 had been allocated to certain specified reserves. A copy of an inventory and balance sheet of the partnership as on the 31st December, 1945, had been given to the deceased and was found among his papers after his death. p. 161-70. p. 28, 1.22.

7. After the death of the deceased the Appellants B. (1), (2), (3) and (4) carried on for their own account the business of the Appellant firm with its assets. They then closed the books on the 30th June, 1946, and after adjustments produced a balance sheet as at 6th June, 1946, purporting to show the amounts to which the deceased was entitled. In closing the books and preparing the balance sheet they carried in various partnership assets at the book values set against them in the previous balance sheet and they included as a Reserve Fund the same sum of £35,000 which had been shown under this head in the previous balance sheet. p. 24, 1.24. pp. 81-2. pp. 171-8.

8. On the 30th November, 1948, the Respondent commenced an action against the Appellants in the District Court of Limassol, claiming:— pp. 1-8.

- 40 (a) a declaration that she was the sole heir of the deceased and entitled to inherit all his movable and immovable property in Cyprus;
- (b) that as such sole heir she was entitled to retire from the Appellant firm on payment to her of the value of the share of the deceased in the partnership property, to be assessed on the current prices or values on the 5th June, 1946, after deduction of

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the specific percentages provided for in Clause (κ) of the Partnership agreement;

(c) in the event of the Appellants not consenting to her retirement from the partnership—an order for dissolution of the partnership;

(d) in the event of the Appellants consenting to her retirement:—

- (i) a declaration that in order to ascertain the value of the share of the deceased the partnership assets should be valued at current prices on the 5th June, 1946, and that the assets to be valued included the immovable property of the partnership; 10
- (ii) an order for the payment of the share of the deceased, as so ascertained; and
- (iii) interest at the rate of 9 per cent. per annum on the share of the deceased, from the 5th June, 1946; alternatively an account of the profits of the Appellant firm from that date until judgment, and an order for payment of 1/5th share of such profits.

p. 5, 1.46.
p. 5, 1.48.
p. 6, 11.1-11.

9. By her Statement of Claim the Respondent alleged that the Appellants had not given her the share of the deceased in the partnership; that they were disputing that she was the sole heir of the deceased; and that they were asserting that even if she was as his adopted daughter entitled to the movables of the deceased, she was not entitled to any share in the immovables belonging to the Appellant firm, and that even if she were proved sole heir she was entitled only to the share of the deceased as it appeared from the balance sheet prepared by them, less the value of the immovables of the firm and less the percentages provided for in Clause (κ) of the partnership agreement, and that the reserve fund of £35,000 was not to be taken into consideration. 20

p. 6, 1.34.

10. The Respondent further alleged that the balance sheet prepared by the Appellants was incorrect, contrary to the partnership agreement and inequitable in that the furniture, machinery and existing goods were greatly undervalued and had not been given their actual value at the time of the death of the deceased, and that the reserves shown were unjustified, excessive and contrary to the partnership agreement. 30

pp. 9-19.

11. In answer to the Respondent's claim the Appellants raised numerous defences. They alleged that the action as constituted was incompetent. They denied that the Respondent was an heir of the deceased or had been lawfully adopted by him, and they alleged that the Appellants B. (3) and (4) and four other named persons claimed to be heirs of the deceased. They further asserted that if the Respondent was entitled to share in the succession to the deceased, she would not be entitled to any part of the deceased's share in the partner- 40

ship which reflected his share in the immovable assets. With regard to the deceased's share in the partnership, they claimed that the balance sheet prepared by them was correctly prepared for the purpose of determining such share, and that the material figures therein, including the sum for reserves, had been approved by the deceased and that his heirs were precluded from re-opening those figures. Further with regard to the reserves, the Appellants alleged that the heirs of the deceased were not entitled to any share therein, and pleaded that the amount of the reserves were moderate and justified and that the question of the reasonableness or otherwise of the reserves could not be reviewed by the Court. Finally, the Appellants denied that the Respondent was entitled to any interest on the amount of the deceased's share in the partnership or to an account of or any share in the profits of the firm since the 5th June, 1946.

12. In consequence of the Appellants' allegation that persons not already defendants to the action claimed to be heirs of the deceased, the persons so named by the Appellants were subsequently added as defendants by amendment. The defendants so added are not parties to this appeal.

13. The action was heard before the District Court of Limassol on the 12th, 13th, 14th and 15th December, 1950, and the 12th, 13th and 14th April, 1951. The judgment of the District Court was delivered by Zannetides, President, on the 28th February, 1953. The District Court held that the fact that no grant of letters of administration to the deceased's estate had been made by a Court in Cyprus was no obstacle to the Respondent's action and that an action relating to inheritance of property in Cyprus could be brought and maintained without such a grant. The District Court held further that the Respondent was lawfully adopted by the deceased; that she was his sole heir and was entitled to inherit his movable property in Cyprus; and that the deceased's share in the partnership property, both movable and immovable, was the movable property of the deceased.

14. On the question as to how the share of the deceased in the partnership should be ascertained, the District Court held that the closing of the accounts and the preparation of the balance sheet, with all the valuations therein, for the year ending the 31st December, 1945, had been done in accordance with the partnership agreement and the long established practice between the partners, and that as a copy of that balance sheet had been received by the deceased without objection the accounts, valuations and balance sheet for the year 1945 bound him and his heirs and could not be reopened and that the ascertainment of the share and interest of the heirs of the deceased at his death involved (in principle) only the posting up of the books from the last balance sheet to the date of death. The Court held, however, that the Respondent was entitled to have an account taken for the period 1st January to 5th June, 1946, in which account the valuation of the assets was to be the same as in the balance sheet for the year 1945.

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15. With regard to the Reserve Fund, the District Court held that the Respondent was entitled to share in the sums of £4,474 16s. 3d. and £8,297 put into reserve in respect of credits to third persons and for stock in stores respectively. As to the remaining items of reserves, the District Court held that the Respondent was entitled to share in the surplus after deducting sums actually used or necessary to be provided, as at the 5th June, 1946, to answer for the contingencies and events for which these items had been set aside.

16. The District Court accordingly ordered accounts to be taken of all partnership dealings and transactions for the period 1st January, to 5th June, 1946; of credits to third persons for goods and tobacco and of the existing goods, both as at the 5th June, 1946; and of the expenses made or necessary to be made as at the 5th June, 1946, out of the items in the reserve fund other than the sums of £4,474 16s. 3d. and £8,297. Further consideration of the action was adjourned. 10

pp. 45-7.

17. Against this judgment of the District Court both the Respondent and the Appellants appealed to the Supreme Court of Cyprus. The Respondent appealed against so much of the judgment as adjudged how the share of the deceased in the partnership should be calculated and against the consequential order as to what accounts should be taken for the purpose of ascertaining such share. The Appellants appealed against so much of the judgment of the District Court as decided that the Respondent's action was maintainable, that she was the sole heir of the deceased and entitled to inherit all his movable property found in Cyprus, that she was entitled to an account of the partnership dealings from the 1st January to the 5th June, 1946, and that she was entitled to a share in the reserve fund. The Appellants further appealed against the order of the District Court directing what accounts should be taken. 20

pp. 48-53.

pp. 53-68.

18. The judgment of the Supreme Court of Cyprus (Hallinan C.J. and Griffith Williams J.) on these appeals was delivered on the 22nd January, 1954. By consent of the parties the Court also gave judgment on the Respondent's claim to interest on the deceased's share in the partnership, which issue had not been dealt with by the District Court. The Supreme Court affirmed the decision of the District Court that the Respondent was the sole heir of the deceased, that she was entitled to the deceased's share in the partnership, and that she was entitled to claim her inheritance in Cyprus without obtaining letters of administration to the deceased's estate. But on the question of how the deceased's share in the partnership was to be ascertained the Supreme Court held, reversing the District Court., that the values given to the partnership assets in the account for the year ending the 31st December, 1945, were not binding on the Respondent for this purpose (being accounts prepared and accepted only for the purpose of arriving at the amount of profits then reasonably divisible) and that the share should be ascertained by taking the fair value to the firm of the partnership assets as on the 5th June, 1946. The Supreme 30 40

Court further held that the deceased's share in the partnership included a fifth share in the net assets of the partnership without deduction of any part of the Reserve Fund.

19. The Supreme Court consequently set aside that part of the order of the District Court directing accounts and substituted an order that accounts should be taken

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- (1) as on the 5th June, 1946, of the fair value to the firm of the debts due for goods and tobacco and of the stock in trade;
 - (2) of the fair value to the firm of all the assets on the 5th June, 1946, excepting goodwill and trade marks;
 - (3) of the sums due to the deceased in the Partners' Accounts (including capital, loan and current, as on the 5th June, 1946, and of the surplus assets on that date); and
 - (4) of sums paid by the Appellants B. (1), (2), (3) and (4) for income tax on the deceased's share in the profits, for estate duty, and for any sum paid to the Respondent's guardian for her use.

20. The Supreme Court further declared that the Respondent was entitled to receive:—

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- A. Such sums as might be found due to her in the Partner's Accounts as on the 5th June, 1946, together with one-fifth share of the surplus assets, subject to the following deductions:—
 - (i) a sum equal to 15 per cent. of one-fifth part of the debts due for goods and tobacco on the 5th June, 1946;
 - (ii) a sum equal to 10 per cent. of one-fifth of the value of the stock-in-trade as on the 5th June, 1946;
 - (iii) whatever sums might be found to have been paid by the Appellants B. (1), (2), (3) and (4) for the use of the deceased or the Respondent in respect of income tax, estate duty or otherwise.
 - 30 B. 9 per cent. interest as from the 5th June, 1946, upon whatever balance might be due to the Respondent under "A" above.

21. The Respondent submits that both the District Court of Limassol and the Supreme Court of Cyprus were right in holding that she was entitled under the law of Cyprus to maintain her action without obtaining a grant of letters of administration to the estate of the deceased, since under the law of Cyprus the estate of a deceased intestate does not vest in the Court but vests in the heir and in the present case in the Respondent.

22. The Respondent further submits that the Supreme Court was right in holding that the deceased's share in the partnership should be ascertained by taking the true value of the partnership assets as on the 5th June, 1946, and that she was not bound by the values placed upon the assets in the accounts for the year ending the 31st December, 1945, or by figures based on such values. The Respondent submits that the direction in Clause (κ) of the partnership agreement that the books shall be closed and a retiring or deceased partner paid every sum to which he shall be entitled in accordance with the books throws no light on the method of valuation to be adopted in preparing the books for the purpose of ascertaining the share of such partner. It is further submitted that in default of any agreement to the contrary the method to be adopted should on principle be to bring in all the property of the partnership at its true value. The Respondent submits that in the present case no agreement to the contrary is to be found in the words of the partnership agreement or to be inferred from the practice followed by the partners in preparing the annual accounts. Those accounts were prepared in circumstances in which the interests of all partners were the same, and for the purpose of arriving at a figure for properly divisible profits, and no account had been prepared with a view to ascertaining the value of the interest of a retiring or deceased partner. The Respondent submits that the present case is indistinguishable in principle from *Cruikshank v. Sutherland* (1923) 92 L.J. Ch. 136 and was rightly so regarded by the Supreme Court of Cyprus.

23. The Respondent submits, with regard to the so-called reserve fund, that the fact that in previous accounts of the partnership various sums had been allocated to specific reserves is wholly irrelevant to the ascertainment of the value of the deceased's share in the partnership assets. It is submitted that the correct principle is that in default of express agreement to the contrary a deceased partner is entitled to a share in the whole balance of assets over liabilities valued as at the relevant date, in the present case the 5th June, 1946. By the terms of the partnership agreement, express provision is made in Clause (κ) by percentage deductions for the possibility that certain assets (viz. book debts and stock) might not realise their then value or that such realisation might be postponed. It is submitted that such express provision is wholly inconsistent with a system of valuation based on artificial book values against which notional reserves are made, and that consequently it is plain that the correct principle of valuation to be applied is to ascertain the true value of all assets of the partnership (other than goodwill or trade marks) deduct therefrom the specific percentages mentioned in the agreement, deduct further all external liabilities, and deduct further all internal liabilities to partners. The resultant figure will be attributable as to one-fifth to the deceased and there will fall to be added thereto any internal debt or credit in capital account of the deceased plus his share of undrawn profits.

24. The Respondent submits finally that in the events which have happened the Appellants B. (1), (2), (3) and (4) did not in exercising their option to

purchase the interest of the deceased comply in all material respects with the terms thereof and that she is accordingly entitled, in accordance with section 44 of the Partnership Law of Cyprus to the interest awarded her by the Supreme Court of Cyprus.

25. The Respondent therefore submits that this appeal should be dismissed with costs for the following among other

REASONS.

- 10 (1) Because the Respondent as sole heir of the deceased was entitled under the law of Cyprus to commence proceedings in respect of her inheritance without having first obtained a grant of letters of administration from a Court in Cyprus.
- (2) Because, on the true construction of the partnership agreement, in making up the books for the purpose of ascertaining the share of a deceased partner, the assets of the partnership are to be brought into account at their true value and not at a notional figure arrived at for different purposes.
- 20 (3) Because, on the true construction of the partnership agreement, the share of the deceased in the partnership assets extends to the whole balance of assets over actual liabilities as at the date of his death.
- (4) Because in the circumstances of the case the Respondent is entitled in accordance with Section 44 of the Partnership Law of Cyprus to the interest awarded to her by the Supreme Court of Cyprus.
- (5) Because the judgment of the District Court of Limassol so far as affirmed by the Supreme Court of Cyprus was right.
- 30 (6) Because the judgment of the Supreme Court of Cyprus was right.

CHARLES RUSSELL.
J. C. CLERIDES.
R. I. THRELFALL.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CYPRUS.

BETWEEN

A. G. PATIKI & CO. and Others - - *Appellants*

— and —

DEMETRA GEORGHIOU PATIKI - *Respondent.*

Case for the Respondent.

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