

Privy Council Appeal No. 5 of 1943

Patna Appeal No. 40 of 1939

Devji Goa and others - - - - - *Appellants*

v.

Tricumji Jivandas and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1944

Present at the Hearing :

LORD THANKERTON

LORD JUSTICE LUXMOORE

SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from a decree of the High Court of Judicature at Patna dated 24th August, 1939, which affirmed with a slight modification a decree of the Subordinate Judge of Dhanbad dated 29th March, 1934, as amended by order dated 31st May, 1934.

The appellants before the Board are defendants 1 to 3, who are the sons of one Goa Petha deceased. They are the principal defendants in the suit. The others (defendants 4, 5, and 6) are *pro-forma* defendants, one of whom, defendant No. 4, the official assignee of Bombay, representing the estate of Gopaldas Tricumji, and Morarji Jairam, insolvents, was afterwards added as a co-plaintiff (plaintiff No. 4) by an order of the Court. The insolvents are two of the members of Plaintiff No. 1—a firm.

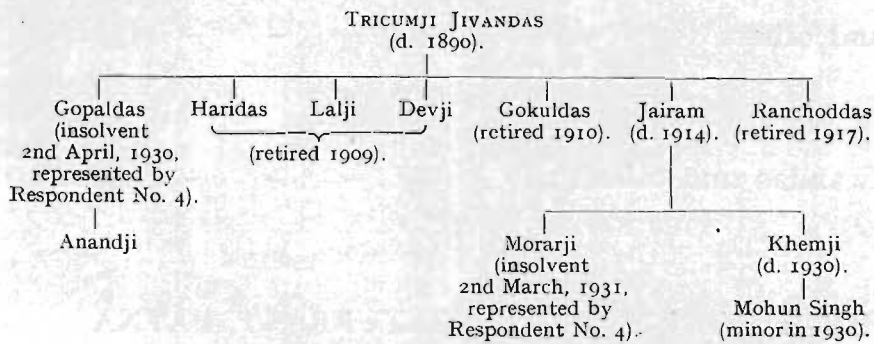
The appeal arises out of a suit for dissolution of a partnership between plaintiff No. 1 and Goa Petha, with respect to some coal lands and colliery business in Jharia Coalfields, and for rendition of accounts.

The business of the partnership was carried on at Cutch, outside British India.

Plaintiff No. 1 "Tricumji Jivandas" is described in the plaint as a firm. Plaintiff No. 2, "Khunji Poonja Co." are a firm who have a charge on the share of plaintiff No. 1, in the lands and business, for the money advanced by them to the said plaintiff. This charge was declared by the Bombay High Court in suit No. 751 of 1924. Plaintiff No. 3, had been appointed receiver in connection with that suit. These are the principal respondents in the appeal, and there is no dispute *inter se* before the Board.

One Tricumji Jivandas, a native of Cutch who died in or about 1890, carried on business in various places in his own name. After his death, the business was continued by seven of his eight sons, named in the sub-joined table and their descendants, by a succession of partnerships to which they gave his name, Tricumji Jivandas. In course of time some members died or retired and the firm was carried on by the other members of the

family. Gopaldas Tricumji was the managing partner of the firm. The following table, and the dates mentioned below, taken from the printed case of the respondents, will be helpful in following the successive partnerships.



Haridas, Lalji and Devji retired in 1909. Gokuldas retired in 1910. Jairam died in 1914 leaving two sons, Morarji and Khemji, who became partners on their father's death. Ranchoddas retired in 1917. Anandji, the son of Gopaldas, became a partner in or about 1922. Khemji died in 1930 leaving a minor son Mohun Singh who was admitted to the benefits of the partnership in his father's place. Gopaldas was adjudicated insolvent on the 2nd April, 1930. Morarji was adjudicated insolvent on the 2nd March, 1931.

Referring to plaintiff No. 1, it was stated in paragraph 1 of the plaint that "its present partners, besides the said Gopaldas Tricumji (one of the sons of Tricumji Jivandas) are his nephews Morarji Joyram and Mohun Singh Khemji and his son Anandji Gopaldas, who is the present managing partner of the firm." These were the only members of the Tricumji family, who had interests in the firm at the time of the institution of the suit, on 11th December, 1931, but whether, in law, they can be said to represent the partnership for the purposes of carrying on the suit, in the name of plaintiff No. 1 described as "Tricumji Jivandas a firm," is a question which their Lordships will have to consider in this appeal.

The following facts are now beyond dispute:—In the year 1900, the firm of Tricumji Jivandas entered into a partnership with Goa Petha, the father of the appellants, and one Bishram Karman, to acquire lands in Jharia Coalfields and work them as a colliery. The share of Tricumji Jivandas and Bishram Karman were $1\frac{1}{2}$ annas each, and the share of Goa Petha was $13\frac{1}{4}$ annas. In case of profit, one anna was to be spent on charity. Thus, the income was to be taken as $17\frac{1}{4}$ annas, if there was profit, and $16\frac{1}{4}$ annas only if there was no profit. The funds for working the business were supplied by Tricumji Jivandas, and the management was carried on by Goa Petha. In 1930, the share of Bishram Karman came into the hands of the appellants, who bought it from one Kora Ramji who had purchased it from the said Bishram Karman. The name of this new business was G.P.C. & Co., and it really consisted of two partners, the firm plaintiff No. 1, and Goa Petha. At the time of the institution of the suit 180 bighas of colliery land belonged to the partnership.

The accounts of the partnership were made up to November, 1918. Tricumji Jivandas received on account of profits Rs.13,500 in 1921, and Rs.10,000 in 1924.

Goa Petha died in March, 1930, and from that time his sons, the appellants worked the colliery.

The suit was instituted on 11th December, 1931. As stated already, it was for dissolution of partnership and for accounts. The plaintiffs (respondents) stated that the accounts of the partnership were adjusted only up to 1918, since which time they said there was no formal adjustment though Tricumji Jivandas received profits now and again up to 1924.

The main defences in the case were, that there was no partnership as alleged by the respondents, that the suit was barred by limitation and that it was not maintainable in law

The Subordinate Judge overruled the above pleas and passed a decree in favour of the plaintiffs, declaring that "in the partnership business carried on in the style of G.P.C. & Co. in the Khas Jinagora Colliery, the firm of Tricumji Jivandas had $1\frac{1}{2}$ annas share in the property and business, and it dissolved in March, 1930, by the death of Goa Petha," and directing accounts to be rendered by the appellants from November, 1918, and a sale of the partnership property in accordance with Order XX., r. 15 and Form No. 21 of Appendix D of Schedule I of the Civil Procedure Code. Provision was also made for drawing up a "final decree."

On appeal, the High Court accepted the findings arrived at by the Trial Court, and affirmed the decree passed by it subject to this modification; namely, that the liability of the appellants for the moneys due up to the death of Goa Petha should be confined "to the assets of Goa Petha which may have come into their hands." In other respects, the decree of the Subordinate Judge was confirmed.

Before the Board, the findings of fact arrived at by the Courts in India have not been questioned by the appellants. The main point argued by their learned Counsel was, that the suit was not maintainable in the form in which it was brought before the Trial Court, and that it should therefore be dismissed. They also very briefly addressed their Lordships on the question of limitation and the nature of the decree passed in the case. Their Lordships will first deal with the latter arguments, reserving the consideration of the main question to the last.

On the question of limitation, the Courts in India found that there was no repudiation of partnership by Goa Petha in 1924 as alleged, that even if there was a repudiation it was not serious and it did not matter as the partnership continued till his death, and that limitation for the suit began only from the time when he died in March, 1930, and as the suit was instituted in 1931, it was not barred by time. If these findings are accepted, as they have been, by their Lordships, Mr. Rewcastle conceded that no question of limitation would arise; but he argued that in the circumstances of the case, it must be held that when the partnership was formed there was a contract by Goa Petha that he would prepare and render accounts annually, that as soon as he failed to render them in any year, there was a breach of contract for which the plaintiffs have a remedy under section 12 of the Specific Relief Act, that the suit should be treated as one for the specific performance of a contract, and when so treated, it was barred by article 113 of the Indian Limitation Act, the period of limitation for such a suit being "three years" from "the date fixed for the performance or when no such date is fixed when the plaintiff has notice that the performance is refused." As regards this argument, their Lordships need only say that it was not raised in the Courts below and cannot now be allowed to be raised here. Their Lordships are also of opinion that having regard to the nature of the partnership which went on as a living concern continuously since the time it was started, that separation or death of some members of the firm, others—their sons or grandsons—taking their place, cannot amount to dissolution, as Goa Petha presumably agreed to treat as partners the remaining members of the firm or such members as were added to it from time to time. As their Lordships are definitely of opinion that the cause of action for the suit arose only on the death of Goa Petha they do not think it is necessary to refer to the other aspects in which the question of limitation was placed before them, though they have considered them.

A subsidiary question argued by Mr. Rewcastle was, that the decree should be varied and that it should be brought into line with the form of the decree suggested in *Syers v. Syers* (1876) 1 App. Cas. p. 174, to the effect that having regard to the interest which the firm of Tricumji Jivandas had in the business, which was very small, sale of the entire business should

not be ordered without giving in the first instance an option to the appellants to purchase that share. Their Lordships are unable to accept this argument as they are satisfied that the decree in question is quite in conformity with the provisions of the Indian Civil Procedure Code, and it does not appear that any application was made by the appellants to the Courts in India to mould the decree in the manner now suggested by them.

Their Lordships will now proceed to consider the important question whether the suit as framed is maintainable. It was argued by Mr. Rewcastle that in law there was no warranty for putting the name of the firm of Tricumji Jivandas as plaintiff in the suit at all, that the suit should have been instituted in the names of the individual members of the firm who existed at the time of the suit, and as this was not done the suit was not maintainable. The High Court met this argument by saying that Order XXX r.1 C.P.C. is wide enough to allow a firm, the members of which have collectively become the members of another firm to sue in the name of the firm of which they are members, that assuming that there was defect in the frame of the suit, no objection was taken in the trial Court, that the names of the members of the firm instead of having been given in the heading of the plaint are mentioned in the body of the plaint, referring to the first paragraph of the plaint which their Lordships have already quoted, that such being the case, the name of plaintiff No. 1 is the descriptive name of the members composing the firm and that for these reasons, the arguments advanced were untenable. (See the judgment of Mahomed Noor J.) Their Lordships find it difficult to accept this reasoning having regard to the facts of this case. Their Lordships have already mentioned the names of the members of the family of Tricumji Jivandas who were interested in the partnership at the time of the institution of the suit. Assuming that Order XXX r.1 is applicable to the case, it was argued by the learned Counsel that in view of the fact that of these, the two insolvents, Gopaldas Tricumji and Morarji retired after their adjudication; one in April, 1930, and the other in March, 1931, and that Mohun Singh being a minor was only admitted to the benefits of the partnership, the only effective member of the firm at the time of the institution of the suit (11th December, 1931) was Anandji, and that he alone cannot constitute a firm for the purposes of the suit. It was also argued that Khemji died in 1930, that no one had been brought on record to represent his interests, and that Mohun Singh not having been made a partner cannot be represented by the "firm." It is also to be noticed—so ran the argument—that Order XXX r.1 is not applicable to the case as the business was carried on outside British India, and that a partnership firm cannot therefore sue in the firm's name. Finally Counsel argued, that Khemji's legal representative and Mohan Singh should be made parties to the suit in order that the appellants should obtain a complete discharge on the taking of accounts.

The arguments outlined above, appearing to their Lordships to be valid, they asked Sir Thomas Strangman, the learned Counsel for the respondents, if he objected to Khemji's son being joined as a party as legal representative of his father, and also in his personal capacity. He replied that he had no objection to his being so made a party. Later on, a few days after the conclusion of the arguments, the learned Counsel asked leave to withdraw his assent, as he was apprehensive that if the accounts were re-opened, the appellants might urge that the share of $1\frac{1}{2}$ annas of the partners in the firm of Tricumji Jivandas should be reduced by $\frac{1}{4}$, i.e., the share of Khemji, on the ground that Khemji's representative had become a party when his claim was barred by limitation. He added that had the point been taken in the first Court, the representative could have been added well within the period. The withdrawal was objected to by Mr. Rewcastle.

Their Lordships do not think it is right to allow the learned Counsel to withdraw his assent, but it may be said that the case seems to have proceeded on the footing that Khemji's interests were represented by his son and that if this aspect of the case had been put before the Trial Court, the defect might probably have been cured in time. On the

other hand, it must also be remembered that the appellants took from the very beginning the objection that the suit was not maintainable. The arguments of the learned Counsel for the appellants cannot be ignored as merely technical, as they touch the very foundation of the case and affect the validity of the suit itself. In the circumstances, without pausing to deal in detail with the arguments of the appellants' learned Counsel, their Lordships think that the right course for them to adopt for the full determination of the dispute between the parties will be to order that Mohun Singh who has now become a major should be joined as a party to the suit as the legal representative of his father and also in his personal capacity. They direct that he should be so made a party, as a co-plaintiff under Order 1, r.10 sub-rule (1) C.P.C. If this is done and the headline of the plaint is suitably amended by adding him as a co-plaintiff in his double capacity, along with the present members of the firm, it is not disputed that Plaintiff No. 1 firm will be properly represented for carrying on the suit.

As a result of the above decision the decrees in the case will have to be set aside and as a necessary consequence, the case should be retried after amending the plaint and the written statement if necessary; but their Lordships think it is desirable that they should point out that as between the present parties they have accepted in full, the conclusions of the Courts below on all the points barring the one relating to the maintainability of the suit which they have now corrected. As regards costs, the appellants will get their costs of this appeal but they will pay the costs already incurred by the respondents in the Courts below. Provision for the future costs will be made in the final decree which will be passed in the suit. Their Lordships direct that the case should be disposed of by the High Court to which it will be remanded as expeditiously as possible in the light of the above observations. They will humbly advise His Majesty accordingly.

In the Privy Council

DEVJI GOA AND OTHERS

v.

TRICUMJI JIWANDAS AND OTHERS

DELIVERED BY SIR MADHAVAN NAIR

Printed by His Majesty's STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1945