

Hubert P. James - - - - - Appellant

v.

Gulam Hussein Pakseema - - - - - Respondent

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 11TH JANUARY, 1949

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*Present at the Hearing :*

LORD OAKSEY  
SIR MADHAVAN NAIR  
SIR JOHN BEAUMONT.

[*Delivered by* SIR JOHN BEAUMONT]

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This is an appeal from a judgment and decree of the High Court of Judicature at Bombay passed in its appellate jurisdiction dated 4th October, 1945, in part reversing and in part confirming a decree of that Court passed in its ordinary original civil jurisdiction on the 22nd December, 1944.

The main question in this appeal is whether the appellant, who was the plaintiff in the suit, and the respondent, who was the defendant, were partners in a restaurant business, or whether the defendant was an employee of the plaintiff in the business entitled to a share of the profits as remuneration for his services. The appellant also claimed from the respondent a sum of over Rs.8,000 alleged to be due in respect of food and other necessaries supplied to the respondent and his family from the business. This last claim failed in both the courts in India and has not been raised before the Board. At the trial Mr. Justice Bhagwati held that the defendant was an employee of the plaintiff; the Appeal Court held that they were partners.

Mr. Justice Bhagwati in a very long, but admirably clear, judgment discussed all the evidence in detail, and gave his reasons for regarding the only important oral evidence, namely that of the appellant, the respondent, and of one B. D. Engineer called on behalf of the respondent, as unreliable. The evidence was also discussed in some detail in the Court of Appeal. Their Lordships will not again go through the evidence in detail, but will confine their judgment to the matters on which the Courts in India differed.

In the month of June, 1936, the Pioneer Coffee House, then known as "Cafe Chevalier", situate in Churchgate Street in the Fort area of Bombay, was purchased by the appellant in conjunction with the respondent, and the question for determination relates to the rights which

the parties then acquired in the business. The arrangement between the parties was oral, but in August, 1936, the appellant set down in writing in a document (Ex. A.) what he alleged to be the terms of the arrangement. More particular reference will be made to this document later. It is not disputed that the appellant paid the whole of the purchase money amounting to Rs.1,150, that the sale deed of the premises dated 19th June, 1936 (Ex. 10), was in his name, as were all the licences and authorities necessary to enable the business to be carried on. These comprised a licence for the sale of tobacco, an eating house licence, and an authority from the Commissioner of Police enabling the restaurant to be kept open until 12.30 a.m, all of which were granted to the appellant as proprietor of the restaurant. As the purchase money was provided by the appellant and all the documents relating to the business were in his name, the burden lies heavily upon the respondent to show that he was interested in the business as a partner.

At the date when the purchase was effected the appellant was a marine engineer employed by the Merchant Steam Navigation Co., Ltd., and was frequently at sea. The respondent had been engaged for many years in the catering business but had met with reverses, and in 1935 a decree of the High Court had been passed against him under which he was liable to pay a sum of approximately Rs.900 for costs. In the litigation in which this decree had been passed the said B. D. Engineer, then an articled clerk of the respondent's solicitors but afterwards an advocate, had acted for the respondent, and a friendship had sprung up between them. On the occasion of the purchase of the Pioneer Restaurant, Engineer, on the suggestion of the respondent, acted both for him and the appellant, and thereafter he continued to help the parties in the business of the restaurant. It is the respondent's case, which was supported by Engineer in the witness box, that the purchase of the restaurant was made by the appellant and the respondent in partnership, the share of the appellant being one-third, and the share of the respondent being two-thirds, and that the documents were all to be in the name of the appellant in order to conceal the interest of the respondent from his creditors. It is the case of the appellant that he was the proprietor and the respondent was his manager on the terms mentioned in Ex. A.

In or about the month of August, 1936, the appellant, whilst on board his ship, wrote out the terms upon which he alleged that the business had been purchased as between himself and the respondent, and handed over the document which is Ex. A to Engineer. Clauses IV to VII of this document are in the following terms:—

“ IV. The basis of the Agreement entered into between Mr. Hubert James on the one side and that of Mr. Gulam Hussein on the other are:—that two-thirds of the profit will be his share, as his remuneration as manager of the restaurant. The other one-third goes to me as financier of the same.

V. Should Mr. Gulam Hussein after the restaurant starts to pay, desire to acquire a partnership in the same, on his son's Ali or that of his wife's name, he may do so by paying two-thirds of the sum spent on the restaurant, at interest of 6 per cent. per annum. The same may be paid in instalments from time to time till the above sum is paid in full. When two-thirds of the capital will then be his. The other one-third will still remain as mine, sharing the profits in the ratio of two to one, i.e., 2 Gulam Hussein and 1 Mr. James.

VI. The whole management of the restaurant is in his hands. He stands to lose nothing, but to gain everything. If Mr. Gulam Hussein is the man I believe him to be, he will for his own interest work up the business. The materials are there, only it wants working up. I am positive the restaurant must pay and that handsomely in a year or two at the most. Provided Mr. Gulam Hussein gives of his best.

VII. The restaurant has been financed by me not for my own personal gain, but solely on behalf of Mr. Gulam Hussein, as a token of friendship towards him. To enable him to take once again that

position he once held in the restaurant business and his community. All I ask in return is honesty and straightforwardness on his part in the affairs of the restaurant. He must think it his own and so keep down as far as possible all unnecessary expenditure. It will be to his own advantage because the sooner it pays, the sooner he will be admitted to partnership."

This document was not signed, but is admittedly in the handwriting of the appellant. It was undated, but certain endorsements made upon it by Engineer in August, 1936, show that it was executed at about that time, and this has not been disputed.

The learned trial Judge accepted this document as correctly stating the terms of the arrangement between the parties and considered it to be the bedrock of the appellant's case. In appeal the learned Judges thought the document of very little value as it merely served to corroborate the evidence of a discredited witness. Mr. Justice Chagla (as he then was) who delivered the leading judgment expressed himself in these terms:—

"It is a statement made by the plaintiff in writing at or about the time recording what in his view were the terms of the agreement. At the highest it is corroborative evidence on behalf of the plaintiff and be it noted that it is not corroboration by any independent testimony but it is corroboration by himself. Now I have already pointed out that as far as the oral testimony of the plaintiff is concerned, it has been thoroughly discredited by the learned Judge. If the substantive evidence itself is tainted and unworthy of credence, it is rather surprising for Mr. Munshi seriously to ask us to attach importance to the corroboration of that substantive evidence by that very man who had been called by the learned Judge a liar."

The learned Acting Chief Justice who delivered a concurring judgment dealt with Ex. A in these terms:—

"On the plaintiff's own admission it was subsequently written out by him. Therefore, to put it at its highest, it is only a piece of corroborative evidence. If the plaintiff's substantive oral evidence on the question of initial agreement is disbelieved, this document loses much of its value because if the substantive evidence is rejected there cannot be anything to corroborate."

With all respect to those learned Judges their Lordships are unable to follow this reasoning. Plainly a document written in 1936 could not corroborate evidence to be given by the writer eight years later. The fact that in 1944, when the parties were at arms length, the appellant gave untrue evidence in the witness box, does not afford an adequate reason for supposing that in August, 1936, he deliberately misrepresented an arrangement arrived at two months earlier. In August, 1936, the parties were on friendly terms, and the appellant had no motive for misrepresenting the arrangement arrived at; whilst the fact that he handed the document to Engineer, the friend and legal adviser of the respondent, seems a sufficient guarantee that the appellant himself thought that he was correctly stating the arrangement arrived at. The evidence of Engineer relating to this document is in the view of their Lordships, as it was in the view of the Trial Judge, manifestly false. He professed in the first instance not to remember whether he had ever read the document. Eventually he said that when he read the document it had struck him that the appellant was trying to resile from the agreement arrived at between the parties, but that he kept silent for fear of causing a rupture between the parties. In their Lordships' opinion Engineer must have read the document, otherwise he would not have known whether to keep it or destroy it. If the respondent was to be a partner in the business Engineer must have realised that the document completely misrepresented the position, and his plain duty was to bring the matter to the attention of the parties. There was no reason for fearing a rupture at that time when the business had only just commenced, and Engineer must have realised the importance of putting the arrangement between the parties on a proper and agreed

basis from the start. In their Lordships' view the only explanation of Engineer's conduct is that he was satisfied that Ex. A correctly stated the agreement arrived at.

Their Lordships would observe that the arrangement embodied in Ex. A seems to have been a very natural one for the parties to have made in the circumstances in which they were placed. The appellant would hardly desire to have as a partner a man who was in financial difficulties, with a creditor who was in a position to attach the share of a partner under Order 21, Rule 49. So far as the respondent was concerned he was to be employed in the class of work to which he was accustomed. He was to receive as his remuneration two-thirds of the profits of the business, and he was relieved of the risk of losing the good will built up by his exertions by the right secured to him to acquire a two-thirds share in the business. He would seem to have been better off than if he had been a partner liable to the debts of the firm and to have his interest attached by his creditors.

Their Lordships are in agreement with the learned Trial Judge in regarding Exhibit A as a most important contemporary document which correctly stated the terms agreed between the parties, and further in thinking that all the later documents treated the appellant as the proprietor of the business for no other reason than that he was in fact such proprietor.

In the Court of Appeal the learned Judges considered that the really decisive document in the case was a will executed by the appellant on the 20th August, 1937. Clause 4 of this document was in the following terms:—

"4. I have during my lifetime invested a part of my estate in a business now carried on under the name and style of the Pioneer Coffee House at Churchgate Street, Bombay. I have agreed with one Gulam Hussein Pakseema to carry on the said business in partnership with him, his share in the said business being  $\frac{2}{3}$  WHEREAS my share in the same being  $\frac{1}{3}$ . At the request of my said partner I have contributed the whole of the capital for the time being employed in the said business including my said partner's share in it and it has been agreed between myself and my said partner that the  $\frac{2}{3}$  part of the capital advanced by me to the partnership in excess of my share for the time being in the said partnership firm should be treated as a loan from me to my said partner and I should be entitled to charge interest thereon at the rate of six per cent. per annum. I hereby direct my Trustees that if my said partner is not able to repay to me during my lifetime the amount of the said advances made by me for his share of the capital my Trustees shall at the request of the said Bejonji Dinshaji Engineer absolve the said Gulam Hussein Pakseema or in case of his death the person or persons entitled to his estate from payment of the interest on the said loan or both the principal amount and interest in respect of the entire loan or the balance thereof for the time being payable by him, PROVIDED HOWEVER that it shall be entirely in the absolute discretion of my said Executor and Trustee Bejonji Dinshaji Engineer whether to release my said partner or in case of his death such person or persons interested in his estate from the whole or any part of such liability without repayment by him or them of the said loan or any part of it as aforesaid."

This will in a sealed cover was deposited in the office of the District Registrar, Bombay, on the 30th August, 1937, under the Indian Registration Act and was revoked by the appellant in August, 1940. The plaintiff in the witness box gave evidence that he did not understand the terms of the will, and that Engineer had not correctly carried out his instructions, but as the learned Trial Judge emphatically rejected this evidence, it must be accepted that the appellant appreciated the contents of the document.

It is strange that none of the three Judges who dealt with this case in India, and none of the counsel engaged on behalf of the appellant,

nor the counsel who signed the appellant's case before the Board seem to have considered that the Court was doing anything unusual in acting upon the will of a living person, a will, too, which had been revoked before the commencement of the suit. The document was throughout referred to as a will and apparently regarded as entitled to the same degree of solemnity and importance as would have attached to it had it been in truth a will, that is the will of a deceased person. A will takes effect on the death of the executant and during his lifetime is an ambulatory document, revocable at any moment, having no legal effect whatsoever. It is a secret and confidential document which the executant is never ordered to produce. In India, where a will may be deposited with the Registrar under the Indian Registration Act, the terms of the Act ensure that the contents remain secret until the death of the executant. (See Section 42-45, Section 55 (4), Section 57 (2).)

Apart from this case their Lordships know of no case, and the industry of counsel has produced none, in which any Court has founded or supported a legal right on the will of a living person. However the appellant, who might have destroyed his will after revoking it and have resisted, successfully their Lordships think, any attempt to make him disclose its contents, adopted neither of these courses. He allowed the document to be put in evidence without objection. In these circumstances, their Lordships, without expressing any opinion upon the wider question whether the will of a living person can ever be relevant to support a legal claim, will deal with the argument of the respondent on the assumption that the admission contained in the document was proved. The respondent argues that here is a piece of paper containing, over the signature of the appellant, an admission of a fact, and such admission can be proved and acted upon although the document in which it is contained may not have the legal effect which it was intended to have. Assuming the admission to be proved, its scope must be determined not only, as with all written admissions, with reference to the whole document in which it appears, but also in the light of the fact that that document was not intended to take effect until the death of the person making the admission. The admission relied on in this case is not specific as to the date or terms of the partnership, or the circumstances in which it was entered into; it merely admits that the relation of partnership had been formed during the lifetime of the testator. Their Lordships think that the admission goes no further than to admit that on the death of the appellant the respondent was to be treated as his partner, and the estate was to be distributed on that basis unless the will was revoked. In their Lordships' view there is no justification for treating clause 4 of the will as admitting the existence of a partnership effective before the death of the testator with all the consequences which would flow from such a relationship. In their Lordships' view therefore the will of the appellant has no bearing upon his relationship with the respondent.

The learned Judges in the Court of Appeal relied mainly on the admission in the will, but considered that there were some other matters which supported the respondent's case and these matters their Lordships will now consider. The first matter relied on related to the bank accounts of the business. At first the account with the Bank of India was in the names of the appellant and Engineer, but in 1938 it was transferred into the name of the appellant alone. In December, 1939, an account was opened in the names of the appellant and the respondent. The appellant says that he did this in order to show his confidence in the respondent who was becoming dissatisfied. The names of the parties were entered under a printed heading "To be used in the case of firms and limited liability Companies," but the parties did not execute the form Ex "Q" which, according to the evidence of a clerk from the bank, the bank required to be executed in the case of partners. There is nothing remarkable in an account being opened in the joint names of the proprietor of a business and his manager, though a joint account by itself would be more appropriate to partnership. It is not, however, the respondent's case that the relationship between the parties was changed in December.

1939, and regarding the partnership accounts from the inception of the business until the respondent was dismissed, they certainly do not support the respondent's case.

The learned Judges next considered two letters written by the respondent to the appellant dated respectively 8th April and 22nd November, 1939, and they thought that the latter letter particularly was one which could only have been written by one partner to another. Their Lordships have carefully considered that letter and are unable to take the same view. The respondent was making certain alternative suggestions to the appellant as to the way in which their differences could be solved, and the second alternative suggestion was that an account should be taken of all the moneys invested in the shop by the appellant, the respondent was then to beg or borrow sufficient to pay off his share and then he was to be given a two-third share in writing on stamped paper. This suggestion seems inconsistent with the existence of a partnership at that time, and the rest of the letter appears to be neutral.

The learned judges also thought that certain accounts asked for by the appellant in his letter to his accountant dated 13th December, 1939, implied a partnership. The accounts were:—

- (1) Particulars of what had been from time to time put in by the appellant as capital;
- (2) The net profits of the shop;
- (3) The present value of the shop on the basis of what had been actually invested either as capital or from its profits;
- (4) ~~Drawing of the respondent and appellant so far.~~

Mr. Justice Chagla thought that if the respondent was an employee the appellant would only require to know what the net profits were up to that date. But this overlooks the fact that profits had been put back into the business and of those profits the respondent was entitled to two-thirds. Their Lordships think that all the accounts asked for would be required whatever the relationship between the parties.

The only other matter on which the learned Judges relied was the evidence of one Fielden, who was called on behalf of the respondent. He had been the manager of J. Walter Thompson and Co., which had entered into an agreement with the Pioneer Restaurant on the 18th September, 1936 (Ex. H.). Fielden stated in the witness box that up to the time of an interview on the 22nd August, 1936, at which he, the appellant, the respondent and Engineer were present, he was under the impression that the respondent was the sole proprietor of the restaurant. His recollection as to this was plainly at fault because in answer to his letter of 17th August, 1936, addressed to the respondent as the owner of the restaurant Engineer replied:—

“On behalf of my client, the proprietor of the Pilot Restaurant, I beg to acknowledge receipt of your letter of the 17th instant, addressed to my client's manager”.

Fielden said that on the day of the interview or possibly a day previous thereto he was informed by Engineer that the appellant and respondent were joint partners or joint proprietors of the Pilot Restaurant. He further said in answer to questions put to him by the judge that his firm never knew the appellant and were not prepared to enter into an agreement with him alone, that they relied upon the experience and the business acumen of the respondent. The statement that Fielden was told by Engineer at the interview that the appellant and the respondent were partners was not accepted by the judge and was inconsistent with the evidence of Engineer who said that throughout the interviews and negotiations with Fielden it was never represented by himself or by the respondent in his presence that the respondent was a part proprietor of the business, and that so far as he knew Fielden was throughout given to understand that the respondent was the manager of the business and

had acted throughout on that understanding. Fielden was no doubt an independent witness and the learned Trial Judge rejected his evidence, not because he thought that Fielden was a false witness, but because he thought that his recollection of events which had taken place eight years before was at fault, and their Lordships agree with this view. The suggestion that Fielden believed the respondent to be a partner in the business and that his firm would not have entered into an agreement except on that basis is disposed of by the fact that that is what his firm did. The agreement of 18th September, 1936, was made with the appellant as proprietor of the Pilot Restaurant and in two clauses the respondent was referred to as the manager.

For the above reasons their Lordships agree with the learned Trial Judge in thinking that the respondent failed to discharge the burden of proving that he was a partner with the appellant.

The learned Trial Judge, after making a declaration that the respondent was a servant and not a partner of the appellant in the business of the Pioneer Coffee House (which was the latest name of the Pilot Restaurant), referred the suit to the Commissioner of the Court for Taking Accounts "to take an account and ascertain the amount due by the plaintiff to the defendant in respect of the defendant's two-thirds share in the net profits of the business of the Pilot Restaurant the India Coffee House and the said Pioneer Coffee House from the 19th of June, 1936, up to the 27th of August, 1940, save and except that the amount claimed by the plaintiff from the defendant as aforesaid shall not be taken into account."

Their Lordships think that these directions are too vague, if there is to be any hope of avoiding Exceptions to the Commissioner's report, and they would add to the direction quoted the following "In taking such account the plaintiff is to be credited before the ascertainment of any profits with any capital put into the business by him but without interest and the defendant is to be debited with all sums drawn by him on account of profits." Their Lordships do not propose to make any alteration in the order made by the Trial Judge as to costs.

Both parties appealed against the decree of the Trial Court, the appellant in Appeal No. 16 of 1945 against the order dismissing his claim to Rs.8,000 odd, and the respondent in appeal No. 18 of 1945 against the order declaring him a servant and not a partner. The order of the Appeal Court dismissing Appeal No. 16 is not affected by this judgment. In Appeal No. 18 the Court directed the taking of partnership accounts and appointed a receiver and manager of the business with consequential directions. There is nothing on the record to show whether the receiver or manager is still in control of the business; if he is, it would be inconvenient to discharge him before other arrangements can be made. The appellant therefore will be given liberty to apply to the High Court for the discharge of the receiver and manager.

For the foregoing reasons their Lordships will humbly advise His Majesty that this appeal be allowed and that the decree made in appeal No. 18 of 1945 by the High Court of Judicature at Bombay on the 4th October, 1945, be set aside, except so far as such decree appoints a receiver and manager of the business and gives consequential directions. The appellant will have liberty to apply to the High Court at Bombay for the discharge of the receiver and manager. The decree of the same Court made in the exercise of its original civil jurisdiction on the 22nd December, 1944, will be restored with the addition indicated above. The respondent must pay the costs of the appeal to the High Court in India and of this appeal.

In the Privy Council

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DELIVERED BY SIR JOHN BEAUMONT

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