Privy Council Appeal No. 27 of 1963

Robert Watte Pathirana – – – – – – *Appellant*

v.

Ariya Pathirana – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JUNE 1966.

Present at the Hearing:

LORD GUEST
LORD PEARCE
LORD UPJOHN
LORD PEARSON
SIR FREDERIC SELLERS

[*Delivered by* LORD UPJOHN]

This is an appeal from a judgment of the Supreme Court of Ceylon (Gunasekara and Sinnetamby J. J.) given on 25th July 1961 which affirmed a judgment of the District Court of Kurunegala dated 31st July 1958 with certain variations, whereby the appellant was held liable to account to the respondent for certain sums arising out of a partnership formerly carried on between them. The respondent was not represented before their Lordships.

The appellant and respondent who though bearing the same name were unrelated had been partners in the business of selling Caltex petrol and Kerosene oil from a Service Station belonging to Caltex Ceylon Limited (who will be referred to as Caltex) as their agents in the district of Kurunegala ever since 1942. The appellant was the active partner who conducted the day to day affairs of the business while the respondent who followed the profession of a dentist was virtually a sleeping partner but whose superior knowledge of the English language was thought to be advantageous in dealing with Caltex.

The partnership was governed by the terms of a written agreement made between the partners on the 30th November 1942. Its terms were clear and are not in dispute and it is not necessary to review it in any detail. It is sufficient to say that it provided (*a*) that the partnership should continue until determined by three months' notice to be given by one partner to the other (*b*) that the name of the firm should be "R. W. and A. Pathirana" (*c*) that the capital of the firm was to be Rs.4,000/- which had been contributed in equal shares by the partners and that the profits and losses of the business should be divided between them in equal shares (*d*) that the management of the business should be in the hands of the appellant who should be entitled to an allowance of Rs.50/- per month for the performance of this duty (*e*) that upon the determination of the

partnership the assets of the partnership should be realised and applied first in payment of the debts and liabilities of the firm secondly in paying to each partner the amount of his capital in the business and the surplus if any should be divided between the partners in equal shares.

The terms upon which the partnership occupied the Service Station, and this was the only business of the firm, were elaborately set out in a number of agreements between Caltex and the firm. Briefly these agreements provided that Caltex would remain in legal possession of the Service Station but the firm should be entitled to use the premises as licensees for the sole purpose of carrying on business as retailers of the products of Caltex there but subject to the consent of Caltex they should be at liberty to stock and market tyres and other non-petroleum motor accessories; that the equipment tools and other articles on the premises would remain the sole property of Caltex but should be used by the firm for the purpose of the business at an agreed monthly rental; that Caltex would supply to the firm for cash, such quantities of its products as it thought fit; that petrol should be retailed to the public coming to the Service Station at such prices as might be fixed by Caltex and that the firm should be entitled to such rebates and allowances as Caltex should currently allow to its retailers.

The business prospered though at one stage the firm had to borrow money to pay for its petrol. However differences arose between the partners and by a plaint (No. 5029) issued in the District Court of Kurunegala on the 18th August 1948 by the respondent against the appellant the respondent claimed that the appellant had withheld from him access to the partnership's books of account, had failed to render proper accounts and he asked for an account of what was due to him as his share of the net profits of the partnership during the three years ending 31st March 1948. This action, which did not ask for dissolution of the partnership, ultimately came on for trial in 1954 and judgment was delivered on 12th November 1954 when it was ordered and decreed that the appellant should pay to the respondent Rs.10,550/- being the respondent's share of the profits less drawings made by him for the three years ending 31st March 1948.

In the meantime and stung no doubt by the issue of this plaint, on 10th September 1948 the appellant gave three months' notice to the respondent to determine the partnership which accordingly terminated on the 10th December 1948.

Shortly after giving this notice, on the 21st September 1948 the appellant wrote to Caltex an important letter without the knowledge or consent of the respondent enclosing a copy of the notice served on the respondent terminating the partnership and continuing " I shall be much grateful if you will kindly alter the name and style of the Agency from 1st October to ' R. W. Pathirana ' instead of the present style ' R. W. & A. Pathirana '."

By return of post Caltex agreed to this. They duly gave notice to determine the existing agreements and in the months of September and October 1948 (before the partnership was terminated) entered into new agreements with the appellant alone. Thereafter the appellant continued to carry on the business on the premises in his own name and did not account to the respondent for his share of capital or any profits.

This change of name and the execution of new agreements with Caltex and the appellant alone during the subsistence of the partnership subsequently came to the knowledge of the respondent who naturally complained bitterly of such conduct but as he received no satisfactory answer to his letter of complaint, on the 25th August 1949 he issued another plaint against the appellant in the District Court of Kurunegala claiming in effect a winding up by the Court and distribution of the assets of the partnership between the partners.

Pleadings were duly delivered but the action seemed to have remained in abeyance pending the hearing of the earlier plaint No. 5029. Ultimately it came on for trial before the District Judge in May 1958 when a large

number of issues were framed and duly answered by him in his reserved judgment

Having regard to the submissions made to their Lordships they however find it necessary to examine only three of them.

The finding in plaint No. 5029 was rightly treated as *res judicata* as to the profits down to 31st March 1948 and the District Judge held in his answer to issue (1) that the profits of the partnership from that date down to dissolution on the 10th December 1948 amounted to Rs.4,600/-. He answered issue (2) by saying that the amount due to the plaintiff at the date of the dissolution of the partnership would be Rs.2,300/-; plainly as their Lordships think half of the sum of Rs.4,600/- mentioned in the judge's answer to issue (1). In his answer to issue (6) the District Judge held:—

> " As the account books are not produced I assess that the plaintiff is entitled to Rs.2,000/- per year as his share of the profits from the business up to date of dissolution."

Counsel for the appellant accepts that " dissolution " must be a misprint for " distribution ". The District Judge then ordered and decreed that the appellant should pay to the respondent profits at the rate of Rs.2,000/- per annum from 31st March 1948 up to date of payment of his capital and taxed costs of action. The appellant appealed to the Supreme Court who affirmed the order and decree of the District Court but varied it in two respects. First because the District Judge seemed to have omitted the sum of Rs.2,300/- due to the respondent under issue (1) that sum was added to the amount of the judgment. That has not been disputed before their Lordships. Secondly upon a concession made by Counsel for the respondent in the Supreme Court the judgment for Rs.2,000/- per annum was limited to the date of the decree.

Before their Lordships Counsel for the appellant directed his main argument to the question whether section 42 of the Partnership Act 1890, which the District Judge impliedly and the Supreme Court expressly held to be applicable to the facts of this case, had in fact any application thereto.

Section 42 (1) is in these terms:—

> " Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent per annum on the amount of his share of the partnership assets."

It was argued before their Lordships that section 42 had been wrongly applied to this case.

It was said that this partnership had no assets and no continuing business; they merely had a licence to sell the goods of Caltex and a few other accessories, which licence could be determined at very short notice. This could not be described, so it was argued, as a business in the ordinary sense at all but a mere licence to trade. So the appellant could not be said to be carrying on the partnership business after dissolution, he was merely licenced to carry on a new trade at the premises by Caltex.

Their Lordships think this argument is entirely fallacious. True it is that the firm's occupation of the premises and its right to trade hung at all times by the most tenuous thread from the good offices of Caltex. But this frequently happens. Caltex was content to let the partnership continue trading on the premises for some years so the firm was able to build up a substantial business at the service station. This brought with it a substantial goodwill, that is the possibility of customers returning to the premises for

more petrol, especially as according to the partnership agreement they were the sole agents for their district of Caltex products. As Romer J. (as he then was) pointed out in *Manley v. Sartori* [1927] 1 Ch. 157 at page 166, goodwill may exist notwithstanding that it is incapable of being ascertained in pounds, shillings and pence.

Here there was a profitable business with a measure of goodwill and after the dissolution it is perfectly clear that the appellant continued in business making use of the respondent's capital none of which had been repaid to him, and of his share of profits since 31st March 1946 which remained in the business. Furthermore the new agreements made between the appellant and Caltex in September and October 1948 during the subsistence of the partnership must on clearly settled principles be treated as partnership property; they were the life blood of the business and so as the Supreme Court pointed out the appellant must be made to account for the profits he thereby made.

It seems clear to their Lordships that section 42 applies, that the respondent " is entitled to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets ".

The Supreme Court also held section 29 of the Partnership Act applied and their Lordships agree. It was argued in the alternative that if section 42 applied there should be a reference back to the District Court with a direction to make such inquiries upon this matter as were directed in *Manley v. Sartori* (*supra*). Their Lordships however do not propose to give such directions; in the first place the appellant did not ask for this relief in either of the Courts below; secondly after this lapse of time it would be wrong to re-open such matters of account and finally it would be most unjust to the respondent to order such inquiries when, as it appears, the appellant refused to produce his books of account at the trial.

The District Judge had to answer the question posed by section 42 as to the share of the profits to which the respondent was entitled in a robust way upon the evidence before him, and in the absence of the books of account which the appellant failed to produce. He did so in a practical way by reducing the half share of profits which the respondent would have received had the partnership continued to a one-third share of the profits, and on that footing he considered Rs.2,000/- was his proper share of the annual profits.

The Supreme Court saw no reason to differ from that practical assessment and neither do their Lordships.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

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In the Privy Council

ROBERT WATTE PATHIRANA

v.

ARIYA PATHIRANA

DELIVERED BY
LORD UPJOHN

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS
1966