LUCAS v. LUCAS

Supreme Court, Brisbane (Gibbs J.).

July 26, October 4, 1961.
March 16, April 5, 1962.

Partnership — Sharefarming agreement — Accounts — Order for sale — Whether accounts to be taken before sale ordered—Ownership of furniture in partnership home—Partner allowed to purchase other partner's share at value fixed by Court.

A father and son carried on a business in partnership as farmers and graziers. After the lands on which the business was conducted had been purchased a house was built thereon and the son and his wife occupied it. Later the father and his wife also moved into the house. Both parties brought furniture to the house, but there were no discussions between the parties as to the ownership of the furniture brought into the house. The partnership was dissolved and subsequently the father issued a writ claiming a declaration that the partnership was dissolved, that an account be taken of all partnership dealings and transactions between the parties and that the affairs of the partnership be wound up, and that a receiver and manager be appointed for the purpose of winding up the partnership.

Held, that there is not the same ground for implying an agreement that furniture brought to the house should become partnership property as there is in the case of articles which are used for the actual purpose of the partnership business, so that the proper conclusion to be drawn was that furniture supplied or bought by either partner should remain his own separate property.

The son alleged that on a winding up of the partnership he would be entitled to some thousands of pounds more than the father. He resisted the father's application for an order for sale before the partnership accounts were taken.

Held that, in the circumstances, a sale should not be ordered before the accounts were taken.

Held, further, that in the circumstances, it would be a proper exercise of discretion to allow the son to purchase the father's interest in the partnership, at the value of the partnership property as fixed by the court.

Syers v. *Syers and another* ([1876] 1 App. Cas. 174) followed.

TRIAL.

William Henry Lucas commenced an action against his son Arthur Charles David Lucas in relation to a partnership of which they were the members. The facts appear sufficiently in the judgment hereunder.

Kelly, for the plaintiff, referred to Lindley on Partnership, 11th ed., p. 409.

Dunn, for the defendant, referred to Lindley, *op. cit.*, pp. 202, 205 ff; *Syers* v. *Syers and another* ([1876] 1 App. Cas. 174).

Curia advisari vult.

GIBBS J.: The plaintiff and defendant, who are father and son, carried on a business in partnership as farmers and graziers on lands at Kooralgin, near Yarraman. The partnership was dissolved on the 28th August, 1959, but the defendant remained in occupation of the lands and in possession of the partnership livestock and other chattels. On the 26th October, 1959, a writ was issued by the plaintiff claiming a declaration that the partnership was dissolved, that an account be taken of all partnership dealings and transactions between the parties and that the affairs of the partnership be wound up, and that a receiver and manager be appointed for the purpose of winding up the partnership. In the statement of claim, which was not delivered until 24th June, 1960, there was added a claim for an order for the sale of the land the property of the partnership. On the 18th December, 1959, Hanger J. appointed one Maurice Edmond Underwood receiver and manager to receive the rents and profits of the partnership business and manage the same until the trial of the action or further or earlier order, and he further ordered that the defendant be permitted to continue to reside on the partnership property and to work thereon as an employee of the said Maurice Edmond Underwood at a weekly wage of £25 payable as from the 18th December, 1959. On the 12th August, 1960, Stable J., by consent ordered that an account be taken of all partnership dealings and transactions between the parties and that all necessary enquiries be made in relation to the said dealings and transactions by a person to be mutually agreed upon by the parties or, in the absence of such agreement on or before the 31st August, 1960, by the Registrar. He further ordered that the weekly wage payable to the defendant pursuant to the order of Hanger J. be reduced to the sum of £10 as from the 16th May, 1960. Although the defendant has continued to reside on the lands he has not received any salary from the receiver and manager. The parties have not agreed upon a person to take the accounts and make the enquiries, and neither party has taken any steps to prosecute the taking of accounts by the Registrar.

On the 7th July, 1961, the plaintiff moved for judgment on the pleadings in the action which he had instituted, and it was admitted that he was entitled to judgment for a declaration that the partnership was dissolved on the 28th August, 1959, and for an order that on the taking of the account of all partnership dealings and transactions and the making of enquiries into the said dealings and transactions pursuant to the order of Stable J., the affairs of the partnership be wound up. I pronounced judgment accordingly.

In addition, the plaintiff moved for an order that the land, the property of the partnership, be sold on the conditions specified in the notice of

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motion, one of which is that the sale of the property be carried out by auction and that the sale be subject to a reserve bidding of the sum of £12,500.

The defendant opposed an order for sale on two grounds—firstly, that in all the circumstances it is more just that the partnership accounts should be taken before the property is put up for sale, and secondly, that before the lands are sold it is necessary to determine whether certain chattels are partnership property. Although the notice of motion of the plaintiff asked for an order for the sale of land it was clear that the plaintiff's proposal was to offer for sale as a going concern, not only the land, together with the house and other fixed improvements thereon, but also all of the partnership livestock, plant, machinery and furniture. The plaintiff had obtained a valuation, which is annexure "A" to the plaintiff's affidavit filed on 13th June, 1961, of all of this real and personal property, and the reserve price of £12,500 was fixed on the basis of this valuation. However, by his affidavit filed on the 6th July, 1961, the defendant claimed that certain of the stock plant machinery and furniture included in the valuation belonged to him and not to the partnership.

After hearing argument I ordered that the issue whether the defendant or the plaintiff rather than the partnership is the owner of any of the property referred to in the valuation forming annexure "A" to the affidavit of the plaintiff filed on the 13th June, 1961, be tried, and I adjourned the motion and reserved the costs of the hearing of the motion. The trial of the issue pursuant to this order, and the hearing of the adjourned motion came on together and the parties gave oral evidence as well as reading affidavits. It is, of course, necessary for me to give my judgment upon the trial of the issue before proceeding to deal with the adjourned motion.

The ultimate test in determining what is partnership property and what is the separate property of the individual partners is the agreement of the parties. In the present case, however, there was no express agreement as to what should become partnership property. Indeed, the partnership agreement, which was oral, seems to have been of the barest possible description and the parties did not by express agreement deal with those matters which normally require attention in an agreement of that kind. In determining what is the partnership property it is therefore necessary to have regard to the source whence the property was obtained, the purpose for which it was used, and the manner in which it has been dealt with, and to the rules laid down by ss. 23 and 24 of *The Partnership Act of* 1891.

It is convenient to deal with the property in dispute in the order in which it is mentioned in the affidavit of the defendant filed on the 6th July, 1961. First, the defendant claims as his separate property all of the furniture listed in annexure "A" except the maple bedroom suite, the china cabinet and one pine box. The circumstances briefly were that after the lands on which the business of the partnership was conducted were acquired a house was built thereon and the defendant and his wife occupied it. Subsequently the plaintiff and his wife also moved into the house. Both parties brought furniture to the house. There was no discussion between the parties as to the supply of furniture or as to the ownership of the furniture brought to the house. In my opinion the household furniture stands in a different position from the stock and farm implements used in the partnership business. There is not the same ground for implying an agreement that furniture brought to the house should become partnership property as there is in the case of articles which are used for the actual purpose of the partnership business (Cf. *Ex parte Owen and Gutch: In the Matter of Bowers and others* ([1851] 4 De. G. & Sm. 351; 64 E.R. 865). I therefore consider that the proper conclusion that should be drawn is that furniture supplied or bought by either partner should remain his own separate property. Of course any furniture bought with partnership moneys became partnership property.

(His Honour considered the evidence and made findings of fact as to the disputed property and continued:)

It then becomes necessary to deal with the plaintiff's motion seeking an order for the sale of the partnership assets. It is clear from the findings made on the trial of the issue that it would not be possible to order a sale at the reserve price suggested in the notice of motion. However, the plaintiff asks that I order that the reserve price be reduced by the amount of the value of the articles which I hold do not form part of the partnership stock.

The defendant opposes an immediate order for sale on the ground that he wishes to attempt to purchase the partnership farm on which he has now resided for about twelve years, and that in all the circumstances it would not be fair to him to order a sale before the partnership accounts are taken. He claims that until the accounts are taken he is not in a position to know how much money he must raise to enable him to finance the purchase of the farm. He further claims that on the taking of accounts there will be a substantial balance in his favour.

In support of his claim to be entitled to a substantial credit balance on the taking of partnership accounts the defendant relies on a number

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of matters, which are dealt with in paragraphs 2, 6, 8, 10, 11-15, 16, 19 and 22 of his affidavit filed on the 24th July, 1961. The plaintiff, whilst conceding that the defendant is entitled to a credit in respect of some of these items, disputes others of them and sets up cross claims in respect of the matters referred to in paragraph 15 of his affidavit filed on 25th July, 1961, and in respect of alleged sales by the defendant of cream, timber, crops and livestock (including certain sheep carcasses referred to in paragraph 11 of the affidavit of the plaintiff filed on 9th December, 1959) the property of the partnership for the proceeds of which the defendant has allegedly failed to account. The plaintiff's submission is that the evidence leaves it in considerable doubt whether there will be a substantial or indeed any balance in the defendant's favour when accounts are taken.

Both parties were agreed that this motion is not to be regarded as a substitute for the taking of partnership accounts, and that I am not called upon to decide whether as a matter of fact the defendant will be entitled to any particular credit balance on the making of proper partnership adjustments. The only object of the evidence in relation to this question is to enable it to be decided whether on the taking of accounts there may be such a balance in the defendant's favour that it would be inequitable to order a sale before the extent of the defendant's interest is determined. Since the issues thus raised between the parties may have to be determined in future proceedings, it would not be desirable for me to canvass the evidence in relation to the matters in contest. If the evidence of the defendant is accepted in full, his interest in the partnership will exceed that of the plaintiff by some thousands of pounds. It cannot be said that the defendant's claim raises questions which are not fit to be tried. It seems to me that I should determine this matter on the basis that on the taking of accounts the defendant may prove to be entitled to an interest substantially greater than that of the plaintiff.

There is no doubt that the general rule is that, in the absence of provision to the contrary in the partnership agreement, on the dissolution of a partnership all the property belonging to the partnership shall be sold. However, the court, in ordering a sale, has a discretion in the exercise of which it will determine the mode of sale most beneficial to the parties.

In *Syers* v. *Syers and another* ([1876] 1 App. Cas. 174) (a case in which the owner of a seven-eighths' interest in a partnership was allowed to purchase his partner's interest at the value fixed by the taking of accounts and making of enquiries) Lord Cairns L.C. said (at pp. 183-4):—

> "It is very true, as was said at the Bar, that on dissolving a partnership of this kind the ordinary course would be for the Court to direct a sale of the assets, and, if necessary, a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the Judge in Chambers. My Lords, these provisions are moulded in every case by the Court to meet the circumstances of the particular case; and it appears to me that, looking at the nature of this business, and looking at the very small interest that was taken in it by the Respondent, it would certainly not be desirable in this case to have a sale or to bring these premises to the hammer . . . "

The plaintiff contends that his *prima facie* right to a sale is strengthened by the fact that the property is deteriorating under the present circumstances. The evidence as to the present condition of the property is brief and inconclusive. The cultivation is not being worked because no moneys are available to enable crops to be sowed. The cattle are not being milked, but milking will commence again round about Christmas time. The defendant claims that some ringbarking and suckering has been done. He said that it is hard to say whether or not the property is deteriorating. On this material, although it is obviously undesirable that the present situation should continue any longer than is necessary, it cannot be said to be established that any serious deterioration of the property is occurring.

I have been in some doubt as to the manner in which it would be proper to exercise my discretion. One circumstance of some weight is that although an order for the taking of accounts was made on the plaintiff's application so long ago as the 12th August, 1960, the plaintiff has not taken any steps to prosecute the taking of the accounts. It is true that it is the defendant who now seeks to have the accounts taken before sale, but if the plaintiff had taken steps to enforce the order which he obtained a year ago the accounts might by now have been taken. There is nothing in the evidence to show that until the present motion was brought before the court the defendant was aware that the plaintiff, who in his statement of claim, had claimed orders for accounts and enquiries as well as sale, proposed to seek an order for sale before he took any steps under the order which he had obtained for accounts and enquiries. The partnership is one between father and son. The defendant has at least raised a serious question as to whether he will not be put in a position of considerable disadvantage in relation to the purchase of the property if the accounts are not taken before the sale is effected. Having regard to the family relationship between the partners, the

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defendant's possible interest in the partnership assets, and the plaintiff's failure to prosecute his order for the taking of accounts, I have decided in the exercise of my discretion to refuse to order a sale at the present time. I only take this course on condition that the defendant consent to continue to work the property in his spare time without remuneration until a sale is effected.

However, the present state of affairs cannot be allowed to continue indefinitely. Since the defendant is now seeking a postponement of the sale until the accounts are taken he must prosecute the order for the taking of the accounts, if the plaintiff does not do so. I propose to adjourn the motion to a date to be fixed, to be brought on by either party on seven days' notice to the other not earlier than three months from the present day. If when the motion is then brought on it appears that the accounts and enquiries have not been taken or made, or at least that substantial progress has not been made in that direction, I shall be disposed to order a sale without further delay.

It is most regrettable that the questions in issue between the plaintiff and the defendant cannot be resolved by a negotiated agreement instead of by the expense of continued litigation. Not only their relationship but also ordinary commercial considerations should indicate to the parties that this is a matter that they should settle by agreement.

In the circumstances of the case I propose to reserve the costs of the motion.

(Subsequently, certain issues in relation to some disputed property were tried by his Honour, and the matter was adjourned to allow the defendant to propose a scheme whereby he could purchase the plaintiff's share in the partnership. The defendant proposed a scheme showing how he could raise the necessary amount, and providing for an immediate payment of portion of the amount to the plaintiff.)

Kelly, for the plaintiff.

Sheahan, for the defendant.

GIBBS J.: In this action, the plaintiff claimed, amongst other relief, an order that the property of the partnership should be sold by public auction. That property comprises a farm together with certain livestock and other chattels. The defendant, on the other hand, has applied for an order giving him permission to buy the plaintiff's share in the partnership property by private sale.

(His Honour repeated the passage at pp. 183-4 in Syers v. Syers (supra) set out above and continued:)

It was pointed out by Harvey J. in *Stone* v. *M'Laughlin* ([1914] 14 S.R. (N.S.W. 146) that the facts in *Syers* v. *Syers* were very special, and that that case is the only reported case of its kind. However, it does appear to me that Lord Cairns was stating a general principle, namely that the court has a discretion to determine in any case whether, on the dissolution of a partnership, the ordinary course should be followed, or whether that course should be departed from to meet the circumstances of the particular case. It seems to me that the court's discretion is not only exercisable in facts such as arose in *Syers* v. *Syers*, but may be exercised in any appropriate case, although it is true that a most important matter for consideration is that the ordinary course is to direct a sale of the assets by auction.

The present case seems to me to be one of those exceptional cases in which it is proper to depart from the ordinary course. The partnership was one between father and son, and for a number of years the defendant, who is the son of the plaintiff, has been living on the partnership property. The property was purchased for the purpose of the members of the family living on it. A valuation of the partnership property has been made, and there is nothing to cast any doubt upon the accuracy of the valuation. Of course, it is possible that on a sale by auction the property would bring more than the valuation figure, just as it is equally possible that it would bring less, but nevertheless a full valuation of the partnership assets has been made.

On a taking of partnership accounts, the balance due to the defendant will be a sum which will be either £624 or £671, depending upon the determination of a question relating to a lighting plant. In addition to that, it is admitted that the defendant is owed an amount of £1,258 11s. 4d. in respect of wages payable under an order of the court. The defendant claims to be entitled to further moneys from the partnership, but his claims have not at the present been substantiated.

On the other hand, the plaintiff claims that on further investigation of the matter it will be shown that moneys are owed to the partnership by the defendant, and the possibility of the existence of this claim is supported by the report of the Receiver, who indicates that he considers it possible that the defendant may not have accounted for income received from the working of the partnership farm.

Apart, however, from a sum of £83 5s. 9d. which the defendant received in respect of the sale of some pigs and of which he must account for half to the partnership, there is not the least evidence to show that the defendant is liable to the partnership in any sum. The parties have had ample opportunity to ventilate their grievances in this matter.

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and, although it will of course be clearly understood that I am not concluding or even expressing an opinion as to the fate of any claims that may be made by either party, the position is that at the moment, apart from the figures that I have mentioned, there is nothing to support a claim by either party against the other. On the present material, therefore, I have to conclude that there is quite a substantial balance payable to the defendant.

Probably not one of the circumstances to which I have referred would in itself have been sufficient to justify the exercise of my discretion in favour of an order for a private sale. However, when all the circumstances of this case are taken together, it does seem to me to be proper that I should permit the defendant to purchase the plaintiff's interest in the partnership property. Subject to anything the parties may have to say as to the form of the order, my order will be as follows: I order that the defendant be at liberty to purchase the share of the plaintiff in all the property of the partnership on the following terms:

(1) The value of the partnership property for the purposes of the above sale is fixed at £12,631 7s. 7d.

(2) The defendant will make the payments set out in paragraphs 4, 5 and 6 of the scheme dated 18th April, 1962, being ex. 3, amended by the substitution of the figure "£1,000" for the figure "£750" in paragraph 6.

(3) The defendant will consent to judgment in favour of the plaintiff for any amount found to be due by him on a final taking of accounts by the Receiver, subject to any application to set aside or vary the findings of the Receiver that either party may be advised to make.

(4) The plaintiff will sign the necessary transfer documents for production to the bank advancing money to the defendant; such documents will be held by the plaintiff's solicitors; and released to the defendant in exchange for the payments mentioned in paragraphs 4, 5 and 6, as amended, of the scheme.

I grant liberty to apply.

I make no order as to costs, including reserved costs.

Order accordingly.

Solicitor for the plaintiff: *H. Roy Gordon*, agent for *Bond & Rea*, Kingaroy.

Solicitors for the defendant: *Pender & Whitehouse*, agents for *J. A. Carroll*, Kingaroy.

A.G.D.