

DAVID (DAVE) THOMAS, PLAINTIFF AND APPELLANT, VS. HERMOGENES S. PINEDA, DEFENDANT AND APPELLANT.

G. R. No. L-2411. June 28, 1951

Ponente: TUASON, J.

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TUASON, J.:

For a first cause of action the plaintiff sought to compel an accounting of the defendant's operation of a saloon and restaurant of which the plaintiff claims to have been the sole owner. For a second cause of action the court was asked to enjoin the defendant from using the name of that business, Silver Dollar Cafe. The court below found for the defendant on the suit for accounting and for the plaintiff on the suit for injunction.

On the first cause of action it is alleged that the defendant managed the business as plaintiff's employee or trustee during the Japanese occupation of the City of Manila and on a share of the profits basis after liberation. Grounded on different relationships between the parties before and after the occupation, this cause of action evolves two different acts of evidence, which it may be well to take up separately for the sake of clarity. We will set out the material facts in so far as they are uncontroverted, leaving for later discussion those about which the parties are in disagreement.

It appears that in 1931, the plaintiff bought the bar and restaurant known as Silver Dollar Cafe located at Plaza Santa Cruz, Manila, from one Dell Clark, paying P20,000 for its physical assets and good will. Thereafter he employed the defendant, Clark's former employee, as a bar-tender with a salary of ₱60. In the course of time, the defendant became successively cashier and manager of the business. The outbreak of war found him holding the latter position with a monthly compensation of ₱250.

To prevent the business and its property from falling into enemy hands, the plaintiff being a citizen of the United States, David Thomas on or about December 28, 1941, made a fictitious sale thereof to the defendant; and to clothe the sale with a semblance of reality, the bill of sale was antedated November 29, 1941.

Though this document was said to have been destroyed and no copy thereof was available, the fictitiousness and lack of consideration of the conveyance was expressly admitted in the answer. Besides this admission, it is agreed that simultaneously with or soon after the execution of the simulated sale, the plaintiff and the defendant signed a private or secret document, identified as Exhibit "F", which was kept by the plaintiff. Because of its important bearing on the case, it is convenient to copy this instrument in full.

"PRIVATE AGREEMENT

"KNOW ALL MEN BY THESE PRESENTS THAT:

"On November 29, 1941, a document which purported to be a deed of sale of the bar and restaurant business known as the SILVER DOLLAR CAFE entered into by and between David (Dave) Thomas and Hermogenes Pineda and acknowledged before Julian Lim, a notary public for and in the City of Manila and entered in his notarial register as Document No. 127, Page No. 27, Book I and Series of 1941, witnessed by the Misses

Florence Thomas and Esther Thomas.

"The said document was prepared and executed only for the purpose of avoiding the seizure of the said establishment if and when the enemy forces entered the City of Manila.

"Upon the restoration of peace and order and the absence of the danger above mentioned, the said document automatically becomes null and void and of no effect, the consideration of Ten Thousand Pesos (P10,000), Philippine Currency, mentioned therein, being fictitious and not paid to the Vendor.

"In witness whereof, we have hereunto set our hands in the City of Manila, Philippines, this 29th day of November, 1941.

"(Sgd.) DAVID THOMAS

"(Sgd.) H. PINEDA

Vendor

Vendee

"In the presence of:

"(Sgd.) ESTHER THOMAS

"(Sgd.) FLORENCE THOMAS"

Thomas was interned at Santo Tomas during the greater part of the war, and his business was operated by the defendant exclusively throughout that period in accordance with the aforequoted stipulation. On February 3, 1945, the building was destroyed by fire but the defendant had been able to remove some of its furniture, the cash register, the piano, the safe, and a considerable quantity of stocks to a place of safety. According to the defendant, all of these goods were accounted for and turned over to the plaintiff after the City of Manila had been retaken by the American Forces.

On May 8, 1945, a bar was opened on Calle Bambang, district of Sta. Cruz, under the old name of Silver Dollar Cafe. Housed in a makeshift structure, which was erected on a lot belonging to the defendant, the Bambang shop was conducted for about four months, i.e., until September of the same year, when it was transferred to the original location of the Silver Dollar Cafe at No. 15 Plaza Sta. Cruz.

It is asserted and denied that the plaintiff as well as the defendant took a more or less active part in the management of the post-liberation business until about the middle of September of the following year, when, it is also alleged, the plaintiff brought a certified public accountant to the establishment in Sta. Cruz for the purpose of examining the books of the business and the defendant threatened the plaintiff and his companion with a gun if they persisted in their purpose. As a result of that incident, the plaintiff forthwith filed the present action, and set up a separate business¹ under the same tradename, Silver Dollar Cafe, on Echague Street. The defendant remained with the Silver Dollar Cafe at Plaza Sta. Cruz, which was burned down on December 15, 1946.

In the face of Exhibit "F" before transcribed, there is no denying that throughout the Japanese military regime the Silver Dollar Cafe belonged exclusively to the plaintiff and that the defendant had charge of it merely as plaintiff's employee, trustee, or manager. There is no pretense that the defendant invested in the business within that period any capital of his own in the form of cash or merchandise.

The controversy lies in the nature and scope of the defendant's obligation toward the plaintiff in relation to the business. It will be noticed that Exhibit "F" is silent on this point. The defendant endeavored to prove that there was a third, verbal, agreement, the import of which was that he was to operate the business with no liability other

than to turn it over to the plaintiff as the plaintiff would find it after the war.

Little or no weight can be attached to this assertion if by it the defendant means, as he apparently does, that he was relieved of any duty to make an accounting. Such understanding as the defendant says existed would be at war with the care and precaution which the plaintiff took to insure his rights in the business and its assets, which had an inventory value of P60,000, according to the plaintiff. As the property consisted mostly of perishable and expendable goods to be constantly disposed of and replenished as long as the business lasted, the plaintiff could not, by any stretch of the imagination, have agreed to be content with what the defendant would deign to give him when normalcy was restored. For that was what the defendant's version of the alleged verbal agreement would amount to and what the court below found. As sole manager with full power to do as his fancies dictated, the defendant could strip the business naked of all its stocks, leaving the plaintiff holding the bag, as it were, when the defendant's management was terminated. Unless Thomas was willing to give away his property and its profits, no man in his right senses would have given his manager an outright license such as the defendant claims to have gotten from his employer.

Not only did the plaintiff see to the execution of a counter agreement but he stated that his elder daughter "had it (Exhibit "F") kept in her possession;" that "there were many efforts by Mr. Pineda to get hold of this document during the first two weeks of the Japanese occupation," and he was "surprised;" that he "did not know what was in the future" and he "wanted my children to have something more than an empty possession." Referring to the defendant's attempts to take Exhibit "F" away from him Thomas said that the defendant sent to the hospital where he (plaintiff) was confined, defendant's friend, an attorney by the name of Swartzcoff of whom he had heard "things", "to recover that document", and he, plaintiff, became more determined not to part with it; that as Swartzcoff kept on coming, he gave the document to his children to keep up to the end of the war. This testimony has all the stamps of veracity and vehemence and refutes the defendant's allegation.

The conclusion thus seems clear that the defendant owes the plaintiff an accounting of his management of the plaintiff's business during the occupation. The exact legal character of the defendant's relation to the plaintiff matters not a bit. It was enough to show, and it had been shown, that he had been entrusted with the possession and management of the plaintiff's business and property for the owner's benefit and had not made an accounting.

Neither did the defendant's sweeping statement at the trial—that all the proceeds from the business had been used to support the plaintiff and his daughters and to entertain or bribe Japanese officers and civilians—dispense with defendant's duty to account. It was a clear error for the court below to declare at this stage of the proceeding, on the basis of defendant's incomplete and indefinite evidence, that there were no surplus profits, and to call matters even.

Under the pleadings and the evidence the court's inquiry ought to have been confined to the determination of the plaintiff's right to secure an accounting; and that right having been established, the appropriate judgment should have been a preliminary or interlocutory one—that the defendant do account. The court was not called upon to decide, and should not have decided, anything beyond that.

Monies and foodstuffs which the defendant said he had supplied the plaintiff and his daughters during the war are appropriate items to be considered on taking account. Receipts and expenses involving thousands of pesos, covering a great length of time, and consisting of complicated items are, on their face, so complex and intricate as to necessitate being threshed out in an appropriate proceeding where objections could be made and alleged misappropriations by the defendant substantiated. By the defendant's admission, the business made good profits during the war, and there are charges that he amassed a fortune out of the trusteeship. True or false, those allegations and many others which it was the plaintiff's right to prove, if he could, should not have been dismissed

summarily. Not technicalities but substantial rights, equity, and justice clearly demanded adherence to the normal course of practice and procedure. The employment of auditors might be necessary.

The defendant denied that the plaintiff had any proprietary interest in the saloon in Bambang and at Plaza Sta. Cruz after liberation. Thomas' evidence on this phase of the litigation is to the effect that, upon his release from the internment camp, he immediately took steps to rehabilitate his business. He declared that he borrowed P2,000 from a friend by the name of Bill Drummond, and with that amount he constructed a temporary building in Bambang and with the stocks saved by the defendant opened the business there. He said that, as before, the defendant now worked as manager, with the difference that under the new arrangement he was to get one-half of the net profits.

The defendant, on the other hand, undertook to show that he himself put up the Bambang business, furnishing the construction materials, paying for the labor, and purchasing the needed merchandise. And when the business was to be moved to Plaza Sta. Cruz, he said, he called on Mrs. Angela Butte, was able to rent the Plaza Sta. Cruz premises from her for P1,200, and told the lessor when he handed her the rent, "This is my money." He went on to say that Thomas told him to do whatever he pleased with the premises, only requesting him to negotiate the sale of or a loan on plaintiff's mining shares so that the plaintiff could join him as partner or "buy him out" by December. But, according to the defendant, the plaintiff was not able to raise funds, so his desire to acquire interest in or buy the business did not materialize. The plaintiff did not invest a centavo in the new business because he had no money to invest, the defendant concluded.

Leaving aside the evidence which depends entirely on the credibility of the witnesses, the following undisputed or well-established circumstances are, in our judgment, decisive:

- The defendant corroborated the plaintiff when he practically declared that upon the plaintiff's release from the internment camp, Thomas lost no time in looking for a site to open a saloon. That the plaintiff then had the means to do that, was a fact brought out by the defendant's own evidence as well as by the plaintiff's testimony. There were several cases of whiskey, rum, gin and other kinds of liquor which the defendant admitted he had carted away and delivered to the plaintiff after liberation. What the latter did or could have done with those goods, if not to start a business with, there was no plausible explanation. Granting that ten cases of the liquor were confiscated by the MP—the plaintiff said they were soon returned—the confiscation could not have stopped the plaintiff from continuing with the business, which was riding in the crest of a boom. Significantly, the defendant said that the day following the alleged confiscation he handed the plaintiff P2,000 in cash. If he had nothing else, this was an amount which ought to have been enough to enable the plaintiff to keep the business going, which needed no large capital. That this payment was "in full and complete liquidation of the Silver Dollar Cafe," as the defendant asserted, was, under the circumstances, highly improbable, to put it mildly.
- It is also an admitted fact that the bar in Bambang was called Silver Dollar Cafe, Branch No. 1. The use of the old name suggested that the business was in fact an extension and continuation of the Silver Dollar Cafe which the defendant had operated for the plaintiff during the enemy occupation, and precluded any thought of the business having been established by the defendant as his own. It should be remembered that the defendant had not yet appropriated the trade-name Silver Dollar Cafe for himself. This—the subject of the second cause of action—he did on September 27, 1945.
- Despite statements to the contrary, it was the plaintiff who, in September, 1945, before the reopening of the bar at Plaza Sta. Cruz, entered into a written contract of lease (Exhibit A) with Mrs. Angela Butte for the Sta. Cruz location; Thomas was named in the contract as the lessee. The contract also reveals that it was the plaintiff who personally paid Mrs. Butte the advanced rent (P1,200) for the period August 31-September 30, 1945, the first

month of the lease. And thereafter, all the rental receipts were made out in Thomas' name, except those for the months of October, November and December, which were put in the name of the defendant. Apropos of this temporary substitution, Jose V. Kamirez, owner of the land and administrator of the building, testified that the Bureau of Internal Revenue had licensed and taxed the business in the name of Hermogenes Pineda and so thought it necessary that for those three months the defendant's name should be put in the receipts. Ramirez added that Mrs. Butte agreed to the Internal Revenue Bureau's requirement on the assurance that beginning January, 1946, the receipts would be issued again in favor of Thomas. Mrs. Butte testified to the same effect.

At any rate, the issuance of three of the receipts in defendant's name was far from implying that he was the proprietor or part owner of the Silver Dollar Cafe. Appropriately, as manager he could make disbursement and get receipts therefor in his name. What would have been strange was the issuance of receipts, let alone the execution of the lease contract, in the name of David Thomas if Thomas had had nothing to do with the business, as the defendant would have the court believe.

The defendant testified, and the lower court believed, that he consented to the issuance of the three receipts and the execution of the contract of lease in the plaintiff's name because it was expected that the plaintiff would buy the business or "chip in" as partner. How the mere possibility, by no means certain, of the plaintiff becoming the owner of the saloon or defendant's partner on some future date could have induced the defendant to let the plaintiff figure unqualifiedly as owner of the business in receipts and leases that had nothing to do with the contemplated deal, and why the plaintiff would want to pose as owner while he was yet a complete stranger to the enterprise, is utterly beyond comprehension.

For the rest, the plaintiff's testimony is as convincing and as well supported by the natural course of things as the defendant's explanation is unreasonable. It can not be disputed that Thomas had accumulated money from the business in Bambang which, it has also been proved to the point of certainty, he operated with the goods retrieved by the defendant from the pre-war Silver Dollar Cafe. Conducting saloons having been the plaintiff's only means of support before the war, and the calling in which he had acquired plenty of experience, it is inconceivable that he would have remained idle at a time when the trade was most lucrative and he had been impoverished by the war. That the plaintiff established a bar behind the Great Eastern Hotel on Echague Street, a hidden place, immediately or very soon after he and the defendant had a falling out, is mute testimony to his eagerness to take advantage of the current boom.

- That the defendant was only a manager is also made evident by two sets of business cards of the Silver Dollar Cafe which he himself caused to be printed. On the first set, of which 500 prints were made, David Thomas was held out as the proprietor and Hennogenes Pineda, the defendant, as manager. On the second set, which were ordered later, the defendant was not even mentioned as manager, but one Bill Wagner, while David Thomas' name was retained as the proprietor.

Customers of the place testified that copies of these cards were handed to them for distribution to their friends by the defendant himself. The defendant swore that he put away the cards in a small drawer under some books and denied they had been distributed. He gave to understand that he was at a loss to know how the plaintiff and his witnesses got hold of some of said cards, though, he said, he suspected that Thomas went upstairs and grabbed some copies while the witnesses found other copies scattered after the fire which burned the establishment for the second time in 1946.

However the case may be, whether the defendant distributed the cards or not, the important point is why he, in the first place, ordered the cards in the form in which they were printed. He did not give cogent reasons. His explanation was that Hugo Santiago, the printer's agent, "gave me a hint that Mr. Thomas was going to open the

Silver Dollar Cafe in Plaza Sta. Cruz." This explanation fails to forge any sensible link between the printing of Thomas' name in the cards and Thomas' plan to join him in the business. Incidentally, the defendant did not tell the truth when he declared that the cards were ordered when the shop was still in Bambang; the cards gave the location of the Silver Dollar Cafe as No. 15 Plaza Sta. Cruz, and, besides, Santiago, who testified for both sides, was positive that the cards were delivered to the defendant in September, 1945.

- At different times from May 8 to December 15, 1945, the defendant handed the plaintiff diverse amounts totalling P24,100 without so much as asking Thomas¹ to sign a receipts for any of them.

The defendant testified that these amounts were simple loans secured by plaintiff's mining shares of stock. The plaintiff countered that they were advances chargeable to his share of the net profits. While he admitted that he owned some Baguio Consolidated and Baguio Gold shares, he denied that he had given them to the defendant as collaterals or in any other concept. He swore that he kept those securities in his own safe and removed them in plain sight of Pineda when he became suspicious of the latter.

It is difficult to understand how the payment of the amounts in question to the plaintiff could have been for any purpose other than that affirmed by him. The lack of any receipt is incompatible with the hypothesis of loans. The defendant's possession of the plaintiff's mining shares, granting that the defendant held them, was no reason for dispensing with the necessity of getting from the plaintiff some form of acknowledgment that the said amounts were personal debts, if that was the case. Without such acknowledgment, which could have been made in a matter of minutes and required no expert to make, the shares of stock did not afford the creditor much if any protection, as an experienced and intelligent man that the defendant is must have realized.

These amounts were the subject of a counterclaim and the court sustained the defendant's theory and gave him judgment for them. In the light of what has just been said and of the evidence previously discussed, there is no escaping the conclusion that the plaintiff was the sole owner of the postwar Silver Dollar bar and restaurant, that the defendant was only an industrial partner, and that the said amounts were withdrawals on account of the profits, which appear from portions of the defendant's entries in the books to have been considerable.

On the second cause of action, which relates to the ownership of the Silver Dollar Cafe trade-name, it appears that the defendant on September 27, 1945, registered the business and its name as his own.

The defendant contends that in 1940, the plaintiff's right to use this trade-name expired and by abandonment or nonuse the plaintiff ceased to have any title thereto. The alleged abandonment or nonuse is predicated on the testimony that the plaintiff expressly allowed the defendant to appropriate the trade-name in dispute.

The parties' actions negative all motions of abandonment by the plaintiff. In the fictitious bill of sale executed on December 29, 1941, the plaintiff asserted and the defendant acknowledged Thomas' ownership of the business. It is manifest from Exhibits "C" and "D", samples of the business cards which were printed at the instance of the defendant himself, that the plaintiff continued to display the name Silver Dollar Cafe after liberation. And when the plaintiff set up a new saloon on Echague Street after he broke with the defendant, he gave the establishment the same appellation—Silver Dollar Cafe.

The most that can be said in favor of the defendant, which is the view taken by the trial Judge, is that the plaintiff instructed Pineda to renew the registration of the trade-name and the defendant understood the instruction as a permission to make the registration in his favor. It is to be doubted whether even honest mistakes were possible under the circumstances of the case. It is an understatement to say that indications pointed to bad faith in the registration. The application for registration contained brazen untruths.

The plaintiff's nonuse of his trade name in 1945, granting that to have been the case, did not work as a forfeiture

of his exclusive right to the name, name which he and the man from whom he bought the business had used for over forty years without interruption. Under the provisions of Commerce Administrative Order No. 1, issued on January 11, 1946, by the Secretary of Commerce and Agriculture, the rights of pre-war registrants of business names, the records of which had been destroyed or lost during the war, were expressly protected. This administrative order was later amended by Administrative Order No. 1-1, dated October 29, 1946, but the amendment referred only to the procedure for authentication of the documents to be submitted. On the other hand, the amendatory order extended the filing of applications for reconstitution up to as late as December 31, 1946, that is, ninety days after plaintiff commenced the present action.

As a legal proposition and in good conscience, the defendant's registration of the trade-name Silver Dollar Cafe must be deemed to have been effected for the benefit of its owner of whom he was a mere trustee or employee. "The relations of an agent to his principal are fiduciary and it is an elementary and very old rule that in regard to property forming the subject matter of the agency, he is estopped from acquiring or asserting a title adverse to that of the principal. His position is analogous to that of a trustee and he cannot consistently, with the principles of good faith, be allowed to create in himself an interest in opposition to that of his principal or cestui que trust. A receiver, trustee, attorney, agent, or any other person occupying fiduciary relations respecting property or persons, is utterly disabled from acquiring for his own benefit the property committed to his custody for management. This rule is entirely independent of the fact whether any fraud has intervened. No fraud in fact need be shown, and no excuse will be heard from the trustee. It is to avoid the necessity of any such inquiry that the rule takes so general a form. The rule stands on the moral obligation to refrain from placing one's self in positions which ordinarily excite conflicts between self-interest and integrity. It seeks to remove the temptation that might arise out of such a relation to serve one's self-interest at the expense of one's integrity and duty to another, by making it impossible to profit by yielding to temptation." (Barretto vs. Tuason, 50 Phil. 888; Severino vs. Severino, 44 Phil., 343.)

To recapitulate, we find from what we believe is conclusive evidence, both direct and circumstantial, that the plaintiff was the owner of the Silver Dollar Cafe at Plaza Sta. Cruz during the enemy occupation and is of right entitled to have an accounting of its administration by the defendant. Exhibit "F" does not state the remuneration the defendant was to be paid for managing the plaintiff's business. The natural presumption under normal circumstances would be that his pre-war compensation was to continue. But conditions during the occupation being different from what they were before the war, the defendant's remuneration may and should be increased if so warranted by the changed circumstances. This matter should be left for consideration in the accounting, having in mind the nature and extent of the services rendered, the volumes of business transacted, the profits obtained and the losses incurred, the personal risks run by the defendant, and other factors related to the success or failure of the defendant's management.

We have it from the plaintiff that he promised to give the defendant one-half of the net profits of the business established in Bambang and later at Plaza Sta. Cruz after liberation. This offer was reasonable, even liberal, and no unforeseen circumstances having supervened to warrant its alteration, the same will not be disturbed and will serve as basis of liquidation. The other bases of liquidation of the post-war business are that the plaintiff was the exclusive owner of its stocks and other assets from May 8, 1945, when it was reestablished in Bambang, to December 15 1946, when the business was levelled to the ground at Plaza Sta. Cruz.

For the reasons hereinbefore stated, the various sums of money aggregating P24,100 and received or taken by the plaintiff were, and they hereby are declared to be, advances on account of the profits, to be deducted in the accounting from the defendant's share of said profits if there be any.

We also find that the trade-name Silver Dollar Cafe belongs to the plaintiff and that the defendant should be and he is perpetually enjoined from using it or any essential part thereof.

In all other respects, especially in connection with the demand for accounting, this case is remanded to the court of origin for further proceedings in accordance with law and the tenor of this decision and for a final judgment on the balance that may be found due from either party.

The defendant will pay the costs of this appeal.

Feria, Pablo, Bengzon, Padilla, Montemayor, Reyes, Jugo and Bautista Angelo, JJ., concur.

CONCURRING AND DISSENTING

PARAS, C. J.:

I concur in the majority opinion except in so far as it requires the defendant to render an accounting of the business Silver Dollar Cafe during the Japanese occupation. The proof shows that the defendant was to hold the enterprise and pretend to be its owner during the war in order to save it from being surely seized by the Japanese as American property, and that the defendant not only succeeded in doing so but, with all honesty, used the proceeds of the business for the support of the defendant and his daughters. The arrangement cannot be said to have been a regular business proposition undertaken by the parties under normal conditions in virtue of which the defendant was made a mere manager; and even if the defendant had in fact derived personal advantages, its justification necessarily follows from the accomplishment of the mission entrusted by the plaintiff. Moreover, the business during the occupation was carried on in Japanese currency which is now worthless.

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