

## DAN FUE LEUNG, PETITIONER, VS. HON. INTERMEDIATE APPELLATE COURT AND LEUNG YIU RESPONDENTS.

*G.R. No. 70926. January 31, 1989*

Ponente: GUTIERREZ, JR., J.

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### GUTIERREZ, JR., J.:

The petitioner asks for the reversal of the decision of the then Intermediate Appellate Court in AC--G.R. No. CV-00881 which affirmed the decision of the then Court of First Instance of Manila, Branch II in Civil Case No. 116725 declaring private respondent Leung Yiu a partner of petitioner Dan Fue Leung in the business of Sun Wah Panciteria and ordering the petitioner to pay to the private respondent his share in the annual profits of the said restaurant.

This case originated from a complaint filed by respondent Leung Yiu with the then Court of First Instance of Manila, Branch II to recover the sum equivalent to twenty-two percent (22%) of the annual profits derived from the operation of Sun Wah Panciteria since October, 1955 from petitioner Dan Fue Leung.

The Sun Wah Panciteria, a restaurant, located at Florentino Torres Street, Sta. Cruz, Manila, was established sometime in October, 1955. It was registered as a single proprietorship and its licenses and permits were issued to and in favor of petitioner Dan Fue Leung as the sole proprietor. Respondent Leung Yiu adduced evidence during the trial of the case to show that Sun Wah Panciteria was actually a partnership and that he was one of the partners having contributed P4,000.00 to its initial establishment.

The private respondent's evidence is summarized as follows:

About the time the Sun Wah Panciteria started to become operational, the private respondent gave P4,000.00 as his contribution to the partnership. This is evidenced by a receipt identified as Exhibit "A" wherein the petitioner acknowledged his acceptance of the P4,000.00 by affixing his signature thereto. The receipt was written in Chinese characters so that the trial court commissioned an interpreter in the person of Ms. Florence Yap to translate its contents into English. Florence Yap issued a certification and testified that the translation to the best of her knowledge and belief was correct. The private respondent identified the signature on the receipt as that of the petitioner (Exhibit A-3) because it was affixed by the latter in his (private respondent's) presence. Witnesses So Sia and Antonio Ah Heng corroborated the private respondent's testimony to the effect that they were both present when the receipt (Exhibit "A") was signed by the petitioner. So Sia further testified that he himself received from the petitioner a similar receipt (Exhibit D) evidencing delivery of his own investment in another amount of P4,000.00. An examination was conducted by the PC Crime Laboratory on orders of the trial court granting the private respondent's motion for examination of certain documentary exhibits. The signatures in Exhibits "A" and "D" when compared to the signature of the petitioner appearing in the pay envelopes of employees of the restaurant, namely Ah Heng and Maria Wong (Exhibits H, H-1 to H-24) showed that the signatures in the two receipts were indeed the signatures of the petitioner.

Furthermore, the private respondent received from the petitioner the amount of P12,000.00 covered by the latter's

Equitable Banking Corporation Check No. 13389470-B from the profits of the operation of the restaurant for the year 1974. Witness Teodulo Diaz, Chief of the Savings Department of the China Banking Corporation testified that said check (Exhibit B) was deposited by and duly credited to the private respondent's savings account with the bank after it was cleared by the drawee bank, the Equitable Banking Corporation. Another witness Elvira Rana of the Equitable Banking Corporation testified that the check in question was in fact and in truth drawn by the petitioner and debited against his own account in said bank. This fact was clearly shown and indicated in the petitioner's statement of account after the check (Exhibit B) was duly cleared. Rana further testified that upon clearance of the check and pursuant to normal banking procedure, said check was returned to the petitioner as the maker thereof.

The petitioner denied having received from the private respondent the amount of P4,000.00. He contested and impugned the genuineness of the receipt (Exhibit D). His evidence is summarized as follows:

The petitioner did not receive any contribution at the time he started the Sun Wah Panciteria. He used his savings from his salaries as an employee at Camp Stotsenberg in Clark Field and later as waiter at the Toho Restaurant amounting to a little more than P2,000.00 as capital in establishing Sun Wah Panciteria. To bolster his contention that he was the sole owner of the restaurant, the petitioner presented various government licenses and permits showing the Sun Wah Panciteria was and still is a single proprietorship solely owned and operated by himself alone. Fue Leung also flatly denied having issued to the private respondent the receipt (Exhibit G) and the Equitable Banking Corporation's Check No. 13389470 B in the amount of P12,000.00 (Exhibit B).

As between the conflicting evidence of the parties, the trial court gave credence to that of the plaintiff's. Hence, the court ruled in favor of the private respondent. The dispositive portion of the decision reads:

"WHEREFORE, judgment is hereby rendered in favor of the plaintiff and against the defendant, ordering the latter to deliver and pay to the former, the sum equivalent to 22% of the annual profit derived from the operation of Sun Wah Panciteria from October, 1955, until fully paid, and attorney's fees in the amount of P5,000.00 and cost of suit." (p. 125, Rollo)

The private respondent filed a verified motion for reconsideration in the nature of a motion for new trial and, as supplement to the said motion, he requested that the decision rendered should include the net profit of the Sun Wah Panciteria which was not specified in the decision, and allow private respondent to adduce evidence so that the said decision will be comprehensively adequate and thus put an end to further litigation.

The motion was granted over the objections of the petitioner. After hearing, the trial court rendered an amended decision, the dispositive portion of which reads:

"FOR ALL THE FOREGOING CONSIDERATIONS, the motion for reconsideration filed by the plaintiff, which was granted earlier by the Court, is hereby reiterated and the decision rendered by this Court on September 30, 1980, is hereby amended. The dispositive portion of said decision should read now as follows:

"WHEREFORE, judgment is hereby rendered, ordering the plaintiff (sic) and against the defendant, ordering the latter to pay the former the sum equivalent to 22% of the net profit of P8,000.00 per day from the time of judicial demand, until fully paid, plus the sum of P5,000.00 as and for attorney's fees and costs of suit." (p. 150, Rollo)

The petitioner appealed the trial court's amended decision to the then Intermediate Appellate Court. The questioned decision was further modified by the appellate court. The dispositive portion of the appellate court's decision reads:

"WHEREFORE, the decision appealed from is modified, the dispositive portion thereof reading as follows:

"1. Ordering the defendant to pay the plaintiff by way of temperate damages 22% of the net profit of P2,000.00 a day from judicial demand to May 15, 1971;

"2. Similarly, the sum equivalent to 22% of the net profit of P8,000.00 a day from May 16, 1971 to August 30, 1975;

"3. And thereafter until fully paid the sum equivalent to 22% of the net profit of P8,000.00 a day.

"Except as modified, the decision of the court a quo is affirmed in all other respects." (p. 102, Rollo)

Later, the appellate court, in a resolution, modified its decision and affirmed the lower court's decision. The dispositive portion of the resolution reads:

"WHEREFORE, the dispositive portion of the amended judgment of the court a quo reading as follows:

"WHEREFORE, judgment is rendered in favor of the plaintiff and against the defendant, ordering the latter to pay to the former the sum equivalent to 22% of the net profit of P8,000.00 per day from the time of judicial demand, until fully 'paid, plus the sum of P5,000.00 as and for attorney's fees and costs of suit'.

is hereby retained in full and affirmed in toto it being understood that the date of judicial demand is July 13, 1978." (pp. 105-106, Rollo).

In the same resolution, the motion for reconsideration filed by petitioner was denied.

Both the trial court and the appellate court found that the private respondent is a partner of the petitioner in the setting up and operations of the panciteria. While the dispositive portions merely ordered the payment of the respondent's share, there is no question from the factual findings that the respondent invested in the business as a partner. Hence, the two courts declared that the private petitioner is entitled to a share of the annual profits of the restaurant. The petitioner, however, claims that this factual finding is erroneous. Thus, the petitioner argues: "The complaint avers that private respondent extended 'financial assistance' to herein petitioner at the time of the establishment of the Sun Wah Panciteria, in return of which private respondent allegedly will receive a share in the profits of the restaurant. The same complaint did not claim that private respondent is a partner of the business. It was, therefore, a serious error for the lower court and the Hon. Intermediate Appellate Court to grant a relief not called for by the complaint. It was also error for the Hon. Intermediate Appellate Court to interpret or construe 'financial assistance' to mean the contribution of capital by a partner to partnership;" (p. 75, Rollo)

The pertinent portions of the complaint state:

x x x x x x x x

"2. That on or about the latter (sic) of September, 1955, defendant sought the financial assistance of plaintiff in operating the defendant's eatery known as Sun Wah Panciteria, located in the given address of defendant; as a return for such financial assistance, plaintiff would be entitled to twenty-two percentum (22%) of the annual profit derived from the operation of the said panciteria;

"3. That on October 1, 1955, plaintiff delivered to the defendant the sum of four thousand pesos (P4,000.00), Philippine Currency, of which copy for the receipt of such amount, duly acknowledged by the defendant is attached hereto as Annex "A", and form an integral part hereof;" (p. 11, Rollo)

In essence, the private respondent alleged that when Sun Wah Panciteria was established, he gave P4,000.00 to the petitioner with the understanding that he would be entitled to twenty-two percent (22%) of the annual profit derived from the operation of the said panciteria. These allegations, which were proved, make the private respondent and the petitioner partners in the establishment of Sun Wah Panciteria because Article 1767 of the

Civil Code provides that "By the contract of partnership two or more persons bind themselves to contribute money, property or industry to a common fund, with the intention of dividing the profits among themselves".

Therefore, the lower courts did not err in construing the complaint as one wherein the private respondent asserted his rights as partner of the petitioner in the establishment of the Sun Wah Panciteria, notwithstanding the use of the term financial assistance therein. We agree with the appellate court's observation to the effect that "x x x given its ordinary meaning, financial assistance 'is the giving out of money to another without the expectation of any returns therefrom'. It connotes an ex gratia dole out in favor of someone driven into a state of destitution. But this circumstance under which the P4,000.00 was given to the petitioner does not obtain in this Case." (p. 99, Rollo) The complaint explicitly stated that "as a return for such financial assistance, plaintiff (private respondent) would be entitled to twenty-two percentum (22%) of the annual profit derived from the operation of the said panciteria." (p. 107, Rollo) The well-settled doctrine is that the "x x x nature of the action filed in court is determined by the facts alleged in the complaint as constituting the cause of action." (De Tavera v. Philippine Tuberculosis Society, Inc., 113 SCRA 243; Alger Electric, Inc. v. Court of Appeals, 135 SCRA 37).

The appellate court did not err in declaring that the main issue in the instant case was whether or not the private respondent is a partner of the petitioner in the establishment of Sun Wah Panciteria.

The petitioner also contends that the respondent court gravely erred in giving probative value to the PC Crime Laboratory Report (Exhibit "J") on the ground that the alleged standards or specimens used by the PC Crime Laboratory in arriving at the conclusion were never testified to by any witness nor has any witness identified the handwriting in the standards or specimens belonging to the petitioner. The supposed standards or specimens of handwriting were marked as Exhibits "H", "H-1" to "H-24" and admitted as evidence for the private respondent over the vigorous objection of the petitioner's counsel.

The records show that the PC Crime Laboratory upon orders of the lower court examined the signatures in the two receipts issued separately by the petitioner to the private respondent and So Sia (Exhibits "A" and "D") and compared the signatures on them with the signatures of the petitioner on the various pay envelopes (Exhibits "H", "H-1" to "H-24") of Antonio Ah Heng and Maria Wong, employees of the restaurant. After the usual examination conducted on the questioned documents, the PC Crime Laboratory submitted its findings (Exhibit J) attesting that the signatures appearing in both receipts (Exhibits "A" and "D") were the signatures of the petitioner.

The records also show that when the pay envelopes (Exhibits "H", "H-1" to "H-24") were presented by the private respondent for marking as exhibits, the petitioner did not interpose any objection. Neither did the petitioner file an opposition to the motion of the private respondent to have these exhibits together with the two receipts examined by the PC Crime Laboratory despite due notice to him. Likewise, no explanation has been offered for his silence nor was any hint of objection registered for that purpose.

Under these circumstances, we find no reason why Exhibit "J" should be rejected or ignored. The records sufficiently establish that there was a partnership.

The petitioner raises the issue of prescription. He argues: The Hon. Respondent Intermediate Appellate Court gravely erred in not resolving the issue of prescription in favor of petitioner. The alleged receipt is dated October 1, 1955 and the complaint was filed only on July 13, 1978 or after the lapse of twenty-two (22) years, nine (9) months and twelve (12) days. From October 1, 1955 to July 13, 1978, no written demands were ever made by private respondent.

The petitioner's argument is based on Article 1144 of the Civil Code which provides:

"Art. 1144. The following actions must be brought within ten years from the time the right of action accrues:

- "(1) Upon a written contract;
- (2) Upon an obligation created by law;
- (3) Upon a judgment."

in relation to Article 1155 thereof which provides:

"Art. 1155. The prescription of actions is interrupted when they are filed before the court, when there is a written extra-judicial demand by the creditor, and when there is any written acknowledgment of the debt by the debtor."

The argument is not well-taken.

The private respondent is a partner of the petitioner in Sun Wah Panciteria. The requisites of a partnership which are - 1) two or more persons bind themselves to contribute money, property, or industry to a common fund; and 2) intention on the part of the partners to divide the profits among themselves (Article 1767, Civil Code; *Yulo v. Yang Chiao Cheng*, 106 Phil. 110) - have been established. As stated by the respondent, a partner shares not only in profits but also in the losses of the firm. If excellent relations exist among the partners at the start of a business and all the partners are more interested in seeing the firm grow rather than get immediate returns, a deferment of sharing in the profits is perfectly plausible. It would be incorrect to state that if a partner does not assert his rights anytime within ten years from the start of operations, such rights are irretrievably lost. The private respondent's cause of action is premised upon the failure of the petitioner to give him the agreed profits in the operation of Sun Wah Panciteria. In effect the private respondent was asking for an accounting of his interests in the partnership.

It is Article 1842 of the Civil Code in conjunction with Articles 1144 and 1155 which is applicable. Article 1842 states:

"The right to an account of his interest shall accrue to any partner, or his legal representative as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary."

Regarding the prescriptive period within which the private respondent may demand an accounting, Articles 1806, 1807, and 1809 show that the right to demand an accounting exists as long as the partnership exists. Prescription begins to run only upon the dissolution of the partnership when the final accounting is done.

Finally, the petitioner assails the appellate court's monetary awards in favor of the private respondent for being excessive and unconscionable and above the claim of private respondent as embodied in his complaint and testimonial evidence presented by said private respondent to support his claim in the complaint.

Apart from his own testimony and allegations, the private respondent presented the cashier of Sun Wah Panciteria, a certain Mrs. Sarah L. Licup, to testify on the income of the restaurant.

Mrs. Licup stated:

"ATTY. HIPOLITO (direct examination to Mrs. Licup).

"Q - Mrs. Witness, you stated that among your duties was that you were in charge of the custody of the cashier's box, of the money, being the cashier, is that correct?

"A - Yes, sir.

"Q - So that every time there is a customer who pays, you were the one who accepted the money and you gave the change, if any, is that correct?

"A - Yes.

"Q - Now, after 11:30 (P.M.) which is the closing time as you said, what do you do with the money?

"A - We balance it with the manager, Mr. Dan Fue Leung.

"ATTY. HIPOLITO:

I see.

"Q - So, in other words, after your job, you huddle or confer together?

"A - Yes, count it all. I total it. We sum it up.

"Q - Now, Mrs. Witness, in an average day, more or less, will you please tell us, how much is the gross income of the restaurant?

"A - For regular days, I received around P7,000.00 a day during my shift alone and during pay days I receive more than P10,000.00. That is excluding the catering outside the place.

"Q - What about the catering service, will you please tell the Honorable Court how many times a week were there catering services?

"A - Sometimes three times a month; sometimes two times a month or more.

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"Q - Now more or less, do you know the cost of the catering service?

"A - Yes, because I am the one who receives the payment also of the catering.

"Q - How much is that?

"A - That ranges from two thousand to six thousand pesos, sir.

"Q - Per service?

"A - Per service, Per catering.

"Q - So in other words, Mrs. witness, for your shift alone in a single day from 3:30 P.M. to 11:30 P.M. in the evening the restaurant grosses an income of P7,000.00 in a regular day?

"A - Yes.

"Q - And ten thousand pesos during pay day?

"A - Yes.

(TSN, pp. 53 to 59, inclusive, November 15, 1978)

xxx xxx xxx

"COURT:

Any cross?

"ATTY. UY (counsel for defendant):

No cross-examination, Your Honor. (TSN. p. 65, November 15, 1978)." (Rollo. pp. 127-128)

The statements of the cashier were not rebutted. Not only did the petitioner's counsel waive the cross-examination on the matter of income but he failed to comply with his promise to produce pertinent records. When a subpoena

duces tecum was issued to the petitioner for the production of their records of sale, his counsel voluntarily offered to bring them to court. He asked for sufficient time prompting the court to cancel all hearings for January, 1981 and reset them to the later part of the following month. The petitioner's counsel never produced any books, prompting the trial court to state:

"Counsel for the defendant admitted that the sales of Sun Wah were registered or recorded in the daily sales book, ledgers, journals and for this purpose, employed a bookkeeper. This inspired the Court to ask counsel for the defendant to bring said records and counsel for the defendant promised to bring those that were available. Seemingly, that was the reason why this case dragged for quite sometime. To bemuddle the issue, defendant instead of presenting the books where the same, etc. were recorded, presented witnesses who claimed to have supplied chicken, meat, shrimps, egg and other poultry products which, however, did not show the gross sales nor does it prove that the same is the best evidence. This Court gave warning to the defendant's counsel that if he failed to produce the books, the same will be considered a waiver on the part of the defendant to produce the said books inimitably showing decisive records on the income of the eatery pursuant to the Rules of Court (Sec. 5(e) Rule 131). 'Evidence willfully suppressed would be adverse if produced.'" (Rollo, p. 145)

The records show that the trial court went out of its way to accord due process to the petitioner.

"The defendant was given all the chance to present all conceivable witnesses, after the plaintiff has rested his case on February 25, 1981, however, after presenting several witnesses, counsel for defendant promised that he will present the defendant as his last witness. Notably there were several postponements asked by counsel for the defendant and the last one was on October 1, 1981 when he asked that this case be postponed for 45 days because said defendant was then in Hongkong and he (defendant) will be back after said period. The Court acting with great concern and understanding reset the hearing to November 17, 1981. On said date, the counsel for the defendant who again failed to present the defendant asked for another postponement, this time to November 24, 1981 in order to give said defendant another judicial magnanimity and substantial due process. It was however a condition in the order granting the postponement to said date that if the defendant can not be presented, counsel is deemed to have waived the presentation of said witness and will submit his case for decision.

"On November 24, 1981, there being a typhoon prevailing in Manila said date was declared a partial non-working holiday, so much so, the hearing was reset to December 7 and 22, 1981. On December 7, 1981, on motion of defendant's counsel, the same was again reset to December 22, 1981 as previously scheduled which hearing was understood as in transferable in character. Again on December 22, 1981, the defendant's counsel asked for postponement on the ground that the defendant was sick. The Court, after much tolerance and judicial magnanimity, denied said motion and ordered that the case be submitted for resolution based on the evidence on record and gave the parties 30 days from December 23, 1981, within which to file their simultaneous memoranda." (Rollo, pp. 148-150)

The restaurant is located at No. 747 Florentino Torres, Sta. Cruz, Manila in front of the Republic Supermarket. It is near the corner of Claro M. Recto Street. According to the trial court, it is in the heart of Chinatown where people who buy and sell jewelries, businessmen, brokers, managers, bank employees, and people from all walks of life converge and patronize Sun Wah.

There is more than substantial evidence to support the factual findings of the trial court and the appellate court. If the respondent court awarded damages only from judicial demand in 1978 and not from the opening of the restaurant in 1955, it is because of the petitioner's contentions that all profits were being plowed back into the expansion of the business. There is no basis in the records to sustain the petitioner's contention that the damages awarded are excessive. Even if the Court is minded to modify the factual findings of both the trial court and the appellate court, it cannot refer to any portion of the records for such modification. There is no basis in the records for this Court to change or set aside the factual findings of the trial court and the appellate court. The petitioner

was given every opportunity to refute or rebut the respondent's submissions but, after promising to do so, it deliberately failed to present its books and other evidence.

The resolution of the Intermediate Appellate Court ordering the payment of the petitioner's obligation shows that the same continues until fully paid. The question now arises as to whether or not the payment of a share of profits shall continue into the future with no fixed ending date.

Considering the facts of this case, the Court may decree a dissolution of the partnership under Article 1831 of the Civil Code which, in part, provides:

"ART. 1831. On application by or for a partner the court shall decree a dissolution whenever:

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"(3) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business;

"(4) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him;

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"(6) Other circumstances render a dissolution equitable."

There shall be a liquidation and winding up of partnership affairs, return of capital, and other incidents of dissolution because the continuation of the partnership has become inequitable.

WHEREFORE, the petition for review is hereby DISMISSED for lack of merit. The decision of the respondent court is AFFIRMED with a MODIFICATION that as indicated above, the partnership of the parties is ordered dissolved.

**SO ORDERED.**

Fernan, C.J., (Chairman), Feliciano, Bidin, and Cortes, JJ., concur.

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