1937 *Present :* **Moseley J. and Fernando A.J.**

AMMAL *et al. v.* IBRAHIM *et al.*

287—D. C. Nuwara Eliya, 1,589.

Partnership—Immovable property purchased by seven partners—Death of one Partner—Devolution of property—Assets of partnership—Beneficial interest—Ordinance No. 22 of 1866.

Where immovable property was purchased by seven persons, who were trading in partnership, the legal title to the property vested in the grantees and, on the death of one of them, the title to his share passed to his heirs.

Held further, that under the conveyance no beneficial title vested in the partnership as such so as to enable the surviving partners to deal with the entire property.

Madar Saibo v. Sirajudeen (*17 N. L. R. 97*) referred to.

THIS was an action for the partition of a land and buildings in the town of Nuwara Eliya. The land in question was purchased by seven persons, who were trading in partnership, one of whom was

P. Ibrahim Saibo. Ibrahim Saibo having died intestate, his interest in the property devolved on the first plaintiff his widow and his children the second and third plaintiffs. The defendants contended that the beneficial interest in the property vested in the various partnerships that from time to time carried on the business of K. Abraham Saibo & Co. The learned District Judge held that the property formed part of the assets of the partnership and, that, after the death of Ibrahim Saibo, the contesting defendants had acquired a good title from the surviving partners.

Rajapakse (with him *M. J. Molligoda* and *M. Mahroof*), for plaintiff, appellants.—Legal title is admittedly in the plaintiffs. The question is in whom was the beneficial title? Contestants say it was in the partnership and it devolved on another partnership without any conveyance. But a partnership in our law, as in the English law, is not a legal *persona,* and has no legal existence outside the individual members constituting it, and therefore it cannot possess rights such as a beneficial title. See *Letchemanan v. Sanmugam* [1]; *Suppiah v. Paliahpillai* [2]; *Landley (1924 ed.), pp. 4, 5, 150, 151, 153, 165.* Legal rights can be acquired only by a person who is known to the law.

Ordinance No. 22 of 1866 introduced the English law of partnership into Ceylon, but this is subject to the proviso that the English law of tenure or conveyance or succession to immovable property is not introduced. Under the English law if one partner buys property with partnership assets, it enures to the benefit of the other partners, but in Ceylon it can give rise to an implied trust only. In Ceylon Ordinance No. 7 of 1840 is applicable. See *Madar Saibo v. Sirajudeen* [3]; *Silva v. Silva* [4], *sections 20, 22, 38 of the Partnership Act; Lindley p. 973.*

The conduct also of the parties indicates that the legal and equitable title vested in the grantees, *e.g.*, administration of estates, shares inventoried and conveyances effected.

The asset, viz., the land cannot pass from one partnership to another without a conveyance. The second partnership was different from the first, and the third from the second, because the partners in each were not the same. Until the land was conveyed by a deed to the second partnership, it remained the property of the partners of the first partnership. *Adamaly v. Asiya Umma* [5] relied on by the District Judge only decided that the death of a partner terminates the partnership. The other portion is *obiter.*

First plaintiff is an illiterate widow still in India, the other plaintiffs were minors, and prescription has not run against any of them. The premises were sold fraudulently by the last surviving partners to four of themselves.

In the earlier case the eighth defendant said there were no books of account. The present books should be rejected. They are fabricated *ad hoc.*

H. V. Perera (with him *C. Nagalingam, N. E. Weerasooria,* and *E. B. Wickramanayake*), for the seventh to sixteenth defendants,

[1] *8 N. L. R. 121 at p. 124.*
[2] *14 N. L. R. 392.*
[3] *17 N. L. R. 97.*
[4] *5 C. W. R. 13.*
[5] *2 Times of Ceylon L. R. 223.*

respondents.—We must ascertain what is partnership property and what are the rights of a partner. A partner is not entitled to a share of each and every article of the partnership property. He is entitled to the assets after the debts are paid. Property can be held by a partner in trust for others. (*Lindley p. 409.*) The land was conveyed to the partners *qua* partners. The form of the conveyance indicates that it is for the firm. Section 21 of the Partnership Act will apply. The vendees do not become owners till all the debts are paid and the money is divided.

If the appellant's argument is right, then it follows that if two people trade in partnership and they buy anything, each becomes entitled to a half.

No one denies that a partnership is not a legal *persona*. From that one cannot draw the inference that a firm is not a legal entity. It is a well established entity in law.

It is wrong to contend that there is no partnership property. What each partner throws into the common fund is partnership property. Third parties are not interested whether it is partnership property or private property, but as between the partners it is of vital importance.

In England the law of partnership was developed in the Courts of Equity. No partner is entitled to any portion of the partnership property. His right is to ask for an accounting at a dissolution. There is a fundamental difference between a co-ownership and a partnership. There is no co-ownership here.

That title to land cannot be acquired without a notarial deed is true *re* legal title only. (Ordinance No. 7 of 1840.) But a deed is not necessary for acquisition of beneficial interests. (*Narayanan Chetty v. James Finlay*[1].) Counsel referred to *Lindley p. 27 and p. 409.*

Under the *Thesawalamai* property acquired by a husband becomes the property of both spouses. The wife gets an equitable interest in the property by operation of law. The beneficial title was in the seven partners as partners. Upon the dissolution of the first partnership, the bare legal title devolved on the heirs of the vendees but in trust for the partnership.

[FERNANDO A.J.—How will it go to the second partnership ?]

Upon the dissolution of the first partnership, the parties or their heirs can only ask for an accounting and get their share paid. (*Lindley, p. 723 ; Adamaly v. Asiya Umma (supra).*) Upon that being done their interest is over and they cease to have any beneficial interest. A notarial instrument is not necessary ; it goes by operation of law.

Rajapakse, in reply.—Narayanan Chetty v. James Finlay decided a case of a *surrender* of an equitable interest *to* the legal title holder (*trustee*). The language used in the judgment which indicates that equitable interests can be *transferred* from the beneficiary to a *third party* without a notarial deed is *obiter* and should not be followed. Ordinance No. 7 of 1840 does not deal with a surrender. A mortgage bond must be notarially executed ; so is the transfer of the mortgagee's rights to a third party, but the surrender of his rights to the mortgagor requires no deed.

[1] *29 N. L. R. 65 at 69*

Contrast the English law with the Ceylon law. See *Lindley, p. 153,* and *Wray v. Wray* [1].

A partnership is not a legal *persona,* but a legal *concept,* just as a servitude, or a mortgage. There must be a legal *persona.* See *Dooby v. Watson* [2] and In *re Barney* [3].

Anything bought with partnership money will not be partnership property unless it is within the scope of the partnership business. Buying and selling was never within the partnership business here.

Cur. adv. vult.

March 17, 1937. FERNANDO A.J.—

The plaintiffs filed this action for the partition of the land and buildings called "Fountain House", in the town of Nuwara Eliya in extent 2 acres 1 rood 22 perches. Their case was, that by deed P 3 of 1902, the land in question was purchased by seven persons, one of whom was P. Ibrahim Saibo, the husband of the first plaintiff and the father of the second and third plaintiffs, and that the said P. Ibrahim Saibo became entitled to a further 2/63 shares on deed of conveyance 361 of May 14, 1912 (P 6), and that Ibrahim Saibo having died intestate in 1915, those shares have devolved on the three plaintiffs.

The claim of the plaintiff was contested by the seventh to sixteenth defendants, whose case was that the beneficial interest in the land was in the various partnerships that from time to time carried on the business known as K. Abraham Saibo & Co. The legal title was admittedly in the seven grantees, but the contesting defendants plead that the beneficial title was in the seven partners, as such, those seven partners being regarded as a firm or a partnership.

The principal questions that arise between the parties are: (1) Did the deed of conveyance P 3 vest the land and premises in the seven grantees in such a way, that each of them acquired absolute title to one-seventh. or did that deed vest merely the legal title in them so that the beneficial interest vested in the partnership composed of the same seven persons. (2) Whether the interest that vested in P. Ibrahim Saibo (the father of the plaintiffs) have now devolved on the plaintiffs, or whether that deed conveyed only the legal title to the grantees, whereas, the beneficial title vested in the partnership in such a manner as to allow the principal partners even after the death of P. Ibrahim Saibo to convey the beneficial interest of the partners to the contesting defendants.

Ordinance No. 22 of 1866 enacts that in all questions which may hereafter arise with respect to the law of partnership, the law to be administered shall be the same as would be administered in England, unless in any case other provision is, or shall be made by any Ordinance now in force in this Colony, or hereafter to be enacted. But this is subject to the provision that nothing herein contained shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance, or assurance, of, or succession to any land, or other immovable property, or any estate, right, or interest therein. It was held by this Court in *Madar Saibo v. Sirajudeen* [4], that " it is clear from Ordinance No. 22 of 1866, that the law as to conveyance of land and

[1] *(1905) 2 Ch. 349.*
[2] *(1888) 38 Ch. 178, at 181 182*
[3] *(1892) 2 Ch. 265 at 272.*
[4] *17 N. L. R. 97.*

rights in land is still the law of the country, and not the English law. It may be that where any land is bought by one of two partners of a firm in his name, out of assets of the partnership, the other partner has the right to claim a conveyance from the first, of the land in favour of the firm, but such a conveyance should be claimed and obtained before the firm can appear in Court, and seek any redress on the footing that it is the owner of the land". It will be noted that Perera J. regarded the partnership, or the firm, as being the owner of the land in certain circumstances, and it is clear that he contemplated the case of all the partners of the firm suing together in respect of a land which had been conveyed to them all. Without such a conveyance in favour of all partners, the firm or partnership cannot seek redress on the footing that it is the owner of the land..

Counsel for the respondents argued that although the legal title was in the grantees, the beneficial title was in the partners, but this assumes, that the partners as such, could acquire a right or interest in the land without a conveyance in their favour. Such a position to my mind would be inconsistent with Ordinance No. 22 of 1866 which provides that the law with regard to the tenure or conveyance of land or any estate right or interest therein should be the law of Ceylon, and Ordinance No. 7 of 1840 provides that no sale of land, and no contract or agreement for effecting any such object or for establishing any interest or incumbrance affecting land or immovable property shall be of force or avail in law, unless the same shall be in writing and signed by the party making the same in the presence of a licensed Notary Public, and two or more witnesses. The case of *Madar Saibo v. Sirajudeen* (*supra*) is of particular importance, inasmuch as it sets out the law as it stood in 1913, and before the introduction of the Trust Ordinance of 1917, which has perhaps altered the position in Ceylon. The question here is whether in 1912, the date of P 6, the beneficial interest in land could vest in a firm or a partnership as such without a conveyance expressly in favour of the firm or partnership.

Now the case for the defendants is that the land in question vested in the seven grantees under P 3, in trust for the partnership which consisted of the same seven persons, and, as Counsel for the appellant argued, the question arises whether it is possible for two or more persons to hold the land in trust for themselves. A partnership as such is not a legal *persona*, and it is clear law that if an action has to be instituted by or against a partnership all the partners must sue, or be sued in the action. In other words, whatever rights are said to belong to a partnership, must vest in the partners as individuals in proportion, no doubt, to the share to which each of them is entitled. It may of course happen that a person who is not himself a partner, may hold property in trust for the partners, in which case the beneficial interest will be in the partners, while the legal title is in the grantee, but it is difficult to see how such a position can arise as the result of a deed which *ex facie* transfers the property to the partners themselves.

Counsel for the respondent referred to the case of *Narayanan Chetty v. James Finlay & Co.*[1] The question before the Court in that case as

[1] *29 N. L. R. 65.*

Garvin J. states, was "whether the extinction or termination of the interests of the *cestui que* trust or the waiver, or assignment of his interest may not be proved otherwise than by a notarially attested writing where the trust relates to immovable property. Garvin J. held that there was nothing in section 2 of Ordinance No. 7 of 1840 which would exclude evidence of the assignment by a *cestui que* trust of his equitable interest, otherwise than by a notarial document. The question before the Court was whether the grantee of land subject to a trust could acquire the interests of the *cestui que* trust without a notarial instrument, and as Counsel for the appellant argued the decision was to the effect that such a surrender or transfer of equitable interest by a *cestui que* trust to the holder of the legal title did not require a notarial instrument. It seems therefore, that this judgment is no authority for the proposition that the *cestui que* trust can transfer his interest to a total stranger without any writing whether notarial or otherwise. It seems inconvenient, to say the least, that the interests of a *cestui que* trust can pass by mere consent of parties and quite unknown to the trustee himself, because it would be difficult for the trustee at any particular time to ascertain who was the *cestui que* trust in whom the beneficial interest vested.

In the case before us, however, the conduct of the parties themselves appears to indicate that each of the seven original grantees was regarded as the full owner of his one-seventh share, and on the death of two of the original grantees, the shares that belonged to them were purchased by the other partners from their heirs on deeds of transfer for valuable consideration. The rights of P. Ibrahim Saibo under the original grant remained vested in him, and he also obtained a share in the interests of the two partners who died and whose heirs transferred after his death. With regard to him, the case for the defendants is that after his death the principal partners under the powers vested in them by the partnership agreement, sold the land for the purpose of winding up the partnership, and that the share due to the heirs of P. Ibrahim Saibo was paid to them after an accounting with them. There is no evidence whatsoever that any one of the plaintiffs was present at such an accounting, nor does the money appear to have been paid to anybody on behalf of P. Ibrahim Saibo ; the allegation merely is that the money was deposited in another branch of the defendants' firm at Katugastota and stands in the books of that firm to the credit of the plaintiffs, and it has not been proved by any member or official of that firm, that they in fact held any money for the plaintiffs.

The learned District Judge held that the deed of partnership P 27 provided that the partnership should continue for a term of thirty-six months, commencing February 23, 1902, and ending on February 22, 1905, or for a longer or shorter period as the principal partners may desire. He states that the partnership did continue till September 17, 1906, when agreement P 28 was executed, and he adds that the property in dispute was treated as part of the assets of the new partnership. There is nothing, however, in P 28 which refers to the property in question, and no accounts or record has been produced which shows that the property in question was dealt with in any way at or about the time when

P 28 was executed. He again held that in 1912, when after the partnership created by P 28 expired, a new partnership was created by P 29, the premises were again treated as part of the new partnership. There is no reference to the premises in question in the partnership agreement, but the document D 1 is headed Balance Sheet for 1911, and it would appear that the total value of the lands at Nuwara Eliya fixed at Rs. 96,200 had been included as the assets of the partnership. The profits of the business are calculated on this footing, and those profits are divided among the partners and the servants of the business according to certain shares set out in D 1. There is nothing, however, to show what was done with the premises in question, nor do the details of the partnership beginning from November 19, 1911, contain any reference to the premises. I can find nothing, therefore, in the documents to prove that the premises in question were at any time treated as part of the assets of the partnership created by the agreement P 29. It is true that P 29 did provide that on the dissolution of that partnership, the partners should convey their respective shares and interests in the land and property and buildings to the principal partners, their heirs, executors, &c., if the principal partners should desire to take over the said partnership business, but the contention for the defence is that in pursuance of the power vested in them by P 29, the principal partners had the right to sell and dispose of any property belonging to the partnership movable and immovable, and that deed P 9 conveying the premises to the contesting defendants was executed in pursuance of that power; but in order to establish that this deed conveyed the land to them, they had to prove first of all that the premises in question did form part of the assets of the partnership created by the document P 29, and that the principal partners found it necessary to sell and dispose of the premises in the winding up of the business. I have already referred to the documents P 4 and P 5, the former being the inventory filed after the death of K. A. Ibrahim Rawther, and P 5, the conveyance by the administrators of his interests to the surviving partners, and to P 6, by which the heirs of A. M. Kanni Saibo similarly conveyed their rights in the premises to the surviving partners. These documents make it clear that the surviving partners did not treat these premises as forming part of the partnership assets, and therefore belonging to the partnership, in spite of the death of two of the partners. On the other hand they treated the heirs of the deceased partners as being entitled to the shares that stood in the name of their intestates, and obtained conveyances from them on that footing.

The learned Judge also says that in terms of the various partnership deeds, each of the partners in the three partnerships or their heirs were either paid off their share of the capital and profits, and thus lost any claim to the property, or signed deed 888 of 1912, P 9. He then deals with each of the persons who from time to time were partners in the firm. The three sons of K. C. Ibrahim Rawther signed the deed 888, P 6; A. M. Kanni Saibo died in 1906, and his heirs are said to have been paid off but as a matter of fact, the heirs also signed P 6. K. Kader Ibrahim Saibo signed deed P 6, as a grantor. P. Sheik Adam Saibo died in 1914 leaving a will by which he left his share to E. Kader Batcha

Saibo, and this Kader Batcha Saibo himself joined in deed P 6. Ena Esubu Saibu retired, and the learned Judge says was paid off, but he also signed P 6. K. Ahamed Saibo died in 1909 and the learned Judge says his heirs were paid his share, but they have also signed a deed conveying the share of the property to the grantees on P 6. Kader Mohideen Saibo signed P 6. Abdulla Saibo's heirs executed deed 1941 in favour of the grantees on P 6. This leaves as the learned District Judge says only P. Ibrahim Saibo through whom the plaintiffs claim, so that all the other persons who were partners at any time either by themselves or by their legal representatives conveyed their interests by deed, and there is no other occasion on which the defendants can say that the interests in the deceased partners or their representatives passed otherwise than by a deed of transfer. The only case in which such a divesting of their interest beneficial or otherwise is pleaded is the case of P. Ibrahim Saibo, and the question arises whether the conduct of the partners has been such as to justify them in pleading that the interest of P. Ibrahim Saibo passed to them in a manner different to the interests of all the other partners.

On a previous occasion, an action was filed against the defendants for an accounting, and they were called upon to produce accounts of the partnership. It was then stated that the account books were not to be found, but in this case two books are produced, viz., the book D 1 and the ledger D 7, and these books are produced by Emma Sheik Davood who says he was employed under the partners since 1902. "In 1902 I was a salesman. Later I was supply clerk. Thereafter I was kanakapulle. The partners signed the Balance Sheet of 1911. I was present. I know P. Ibrahim Saibo. I signed this Balance Sheet. I cannot remember if P. Ibrahim Saibo signed it in my presence. I know the signature of P. Ibrahim Saibo. × on page 384 is his signature." In cross-examination he stated, "each branch kept their books at the branch shop. Books were preserved when the old firm dissolved. The partners removed the books to Katugastota about 10 years ago, I can't say when definitely. I can't say if it was 10 years ago, I didn't see the books removed. I have heard it from the other employees in the shop. In May, 1934, Mohamadu Meera, son of the principal partner K. Ibrahim Saibo, handed me D 1 and D 7, and asked me to keep them safe until his return. I didn't ask him where the other books were. Mohamadu Meera has not come back yet. K. Ibrahim Saibo took charge of the old books when the business was sold in 1917. Mohammadu Meera is his son". In view of this evidence, I do not think the defendants were entitled to produce the books D 1 and D 7, or to ask the Court to accept them as books regularly kept in the ordinary course of the business. It is clear from the evidence of Emma Sheik Davood which I have quoted above, that there were regular books kept at Nuwara Eliya as well as in the other shops carried on by the partnership, and all these books appear to have been taken over by Mohamadu Meera who for reasons of his own has chosen to keep away from the witness box. He apparently selected these two books as being suitable for production from his own point of view, and gave instructions to the witness to produce these, and these only. The other books have been deliberately kept away

from Court, and it is obviously unfair to the plaintiffs that the Court should accept these as being proper books of the firm without giving plaintiffs an opportunity to examine all the books.

On the issues framed, I would hold on the first issue that the grantees of the deed 4,963 became beneficially entitled to the land in question inasmuch as they were the grantees to whom the land was conveyed, and they were also partners of the business.

On the second issue, I would hold that the heirs of K. C. Ibrahim Rawther became entitled to the share of the deceased, and that this title has been recognized by the other partners of the firm.

Issue 3 must also be answered in the same way, in view of the fact that conveyances were obtained from all the heirs of the intestates referred to.

With regard to issue 4, I would hold that it has not been shown that the property in question was the property of the four partners or that the grantors on deed P 9 had the right to transfer the property as part of the partnership assets.

On the eighth issue, I would hold that there is no evidence to prove that the value of the land and premises was included in the capital account of the several partnerships, and I would similarly hold that there is no evidence with regard to issue 9.

With regard to issues 12A and 12B, I would hold that the heirs of P. Ibrahim Saibo did not become liable to convey their shares to the principal partners, or to the seventh to sixteenth defendants.

On issue 13 the onus was clearly on the defendants, and I think the learned District Judge was wrong in accepting the evidence which he himself states was very meagre.

For these reasons, I would set aside the judgment of the learned District Judge and send the case back for an order of partition to be entered on the footing that the plaintiffs as heirs of P. Ibrahim Saibo are entitled to the shares conveyed to him as one of the grantees on deeds, P 3, P 4, P 5, and P 6. The contesting defendants will pay to the plaintiffs their costs of this appeal, and of the contest in the Court below. All other costs will be costs in the cause.

MOSELEY J.—I agree.

Appeal allowed.