1939 *Present :* **Soertsz A.C.J. and Nihill J.**

BROWNE *v.* DAVIS.

118—D. C. Nuwara Eliya, 2,099.

Partnership—Action for dissolution—Right of partner to retire—Power of Court to order dissolution—No reasonable prospect of profit a good ground for dissolution—Partnership Act, 1890, ss. 53 and 54 Victoria, Cap. 9, s. 32.

The power of a Court to order a dissolution of a partnership under section 32 of the Partnership Act, 1890, is not fettered by the terms of a partnership agreement.

The fact that a partnership agreement gives a partner the remedy of retirement does not deprive him of the right to ask for a dissolution of the partnership.

Where a partnership cannot be carried on with a reasonable prospect of profit, that would be a good ground for dissolution.

THIS was an action for dissolution of partnership entered into between the plaintiff-respondent and the two defendants-appellants on August 17, 1933. The nature of the business was that of a preparatory school known as Haddon Hill for the children of European parents. The learned District Judge ordered a decree of dissolution and the defendants-appellants appealed from that order.

J. E. M. Obeyesekere (with him *O. L. de Kretser Jr.*), for the defendants, appellants.—The dissolution is asked for on the grounds that—(1) the business could only be carried out at a loss, and (2) there is a loss of confidence in the partners. English law of Partnership is applicable. The dissolution is asked for under section 35 of Partnership Act, 1890 (*53 and 54 Vic.* c. *39* and *Lindley on Partnership* (*8th ed.*) *p. 641*). Under that section a discretion is vested in the Court to dissolve the partnership

on the grounds stated therein, but this discretion cannot be exercised where the terms of the deed of partnership had provided for the retirement of the partner.

To obtain a dissolution under the first ground, the plaintiff must prove that there is no hope of ever getting profits. Otherwise any partner could come into Court and get the necessary publicity to spoil the business.

The question whether the business can be carried out without loss is considered in *Handyside v. Camel*[1]; *Jennings v. Baddeley*[2]; and *Bailey v. Ford*[3].

The partnership can be dissolved only in the manner laid down in the deed and the Court will not exercise its discretion in favour of dissolution as held in *Moss v. Elphick*[4]; and in *Abbott v. Abbott*[5]. The partnership could not be determined at the instance of one of the partners. The Court should not exercise its discretion in favour of a plaintiff who has not availed himself of that provision of the deed.

Loss of confidence to carry on the partnership is dealt with in *Lindley on Partnership, p. 656; Anonymous (1855) 2 K. & J. 441 at 451*; and *Harrison v. Tennant*[6].

H. V. Perera, K.C. (with him *E. F. N. Gratiaen*), for plaintiff-respondent.—The plaintiff is a man of substance and he will have to pay the debts of the partnership. There are writs against the first defendant. The buildings are in a dilapidated state and there is another rival institution.

The clauses in the deed cannot supersede the Partnership Act. Further, the powers of Court cannot be abrogated or superseded by an agreement. The business is insolvent and if a partner retires he retires burdened with those liabilities. The debts of the business would be hanging over his head for a number of years.

At the dissolution the other partners can buy the business. The plaintiff does not want to put capital into the business because the buildings are depreciating in value. If the deed provides for bringing in more capital, then Court need not exercise its discretion in favour of the plaintiff.

In *Anonymous (1855) 2 K. & J. 441*, the man had recovered and the Court refused to grant a dissolution. The depreciation must be taken into account in valuating the profits. *In re the Spanish Prospecting Company, Ltd. (1911) 1 ch. 92*, held that the true profits must be ascertained in finding whether the business is making profits. *Robinson v. Ashton*[7], decided that the rise and fall in the value of plant must be taken into account. It was held in *Jennings v. Baddeley*[8], that the partners could not be compelled to bring in more capital. It was found in *Handyside v. Camel*[9], that the loss in profits was due to circumstances which would not exist always.

[1] *17 T. L. R. 623.*
[2] *(1856) 3 K. & J. 78.*
[3] *(1843) 13 Sim. 495.*
[4] *(1910) 1 K. B. 846.*
[5] *(1936) 3 All E. R. 823.*
[6] *(1856) 21 Beav. 482 at 492.*
[7] *(1875) 20 Eq. 25.*
[8] *(1856) 3 K. & J. 78.*
[9] *17 T. L. R. 623.*

The Court will consider the circumstances at the date of the action—see *Anonymous (1855) 2 K. & J. 441.*

J. E. M. Obeyesekere, in reply.—A party cannot make use of conditions brought about by himself as held in *Silva v. Nona Hamine*[1]. A party who ruins the business cannot ask for a dissolution—see *Lindley on Partnership, p. 658.*

Cur. adv. vult.

June 19, 1939. NIHILL J.—

In this case the defendants-appellants appealed from a decree of the District Court at Nuwara Eliya dissolving a partnership which existed between them and the plaintiff-respondent. The nature of this business was that of a preparatory school known as Haddon Hill which is a school at Nuwara Eliya for the children of European parents. It is unnecessary for me to detail the history of this school as this is fully set out in the judgment of the learned District Judge. It will suffice to mention that it was founded by the first defendant-appellant, Mr. Davis, in 1918. Mr. Davis returned to England in 1926, and thereafter took no part in the actual management of the business. For some years the business prospered under the ægis of a popular Headmaster, Mr. Hawkins, who died under tragic circumstances on January 1, 1933. The second defendant-appellant, Mr. Hogg, who had been a partner since 1930, carried on the school single-handed for a few months when he was joined by the plaintiff-respondent, Mr. Browne, in July, 1933. Mr. Browne paid in cash for his share a sum of Rs. 56,000 odd and became entitled to an 18/45th share in the business. Mr. Davis retained a 20/45th share and Mr. Hogg's interest stood at 7/45ths. Under a deed of partnership which was executed in July, 1933, the partnership was to be for life subject to a retirement clause. By the same deed Mr. Browne was declared to be the Headmaster of the school with sole control on the educational side and Mr. Hogg was declared to be solely in control of the business administration. Both Mr. Browne and Mr. Hogg were to receive a salary of £450 per annum apart from profits and £300 of Mr. Hogg's salary was guaranteed to him as a prior charge after payment of the trading liabilities.

Since the inception of this partnership until the institution of this action it is undisputed that the business had decreased steadily. If numbers be a true index of a school's prosperity, as they must be in an establishment which is run for profit, there are now about half as many pupils as there were in 1933. Further, the profits on whatever basis they be computed have dwindled to a negligible figure or less. It is the contention of the plaintiff respondent that under no circumstances can this business in future under the present partnership be carried on except as a loss, and this was his main ground in asking for a dissolution.

The action went to trial on a number of issues but before considering these and the learned District Judge's answers thereto, it will be convenient

[1] *(1906) 10 N. L. R. 44.*

first to deal with the point taken by learned Counsel for the appellants that the Court cannot or should not exercise the discretion of dissolution in favour of a partner who has the remedy of retirement by the terms of the partnership agreement. Counsel has urged that the fact that section 32 of the Partnership Act, 1890 (*53 and 54 Vic. Cap. 39*) which applies to Ceylon is made subject to any agreement between the parties, shows that the Act sets store on that which has been agreed upon by partners and that it was not intended that the relief obtainable under the Act should provide a means by which a dissatisfied partner can run away from his partnership obligations. Undoubtedly under section 35 of the Act the Court must look at all the circumstances before coming to a decision based on equity and justice and it might well be that the Court would look with disfavour upon a partner who was anxious to leave his co-partners in the lurch prematurely merely because a business voyage was proving hazardous, whereas by a little courage and resolution he might bring himself as well as his partners safely into port. The contention cannot however be stressed so far as to rule out the Court's powers to consider an application for dissolution where a right of retirement exists. In the first place there is nothing in the wording of section 35 similar to the wording used in section 32, neither do the two sections relate to the same thing. Section 32 enumerates circumstances under which partnerships, unless there is something to the contrary in the agreements, are dissolved *ipso facto*, whereas section 35 sets out the circumstances under which a partner bound by a partnership not otherwise dissoluble may apply to the Court for dissolution. If then the Court's powers under section 35 of the Act are unfettered the only question in which we are concerned in this appeal is to determine whether the Court below has exercised its discretion judicially. Now it is clear from the judgment of the learned District Judge that his main ground for ordering a dissolution was because he was satisfied on the evidence that a continuation of the partnership must involve certain loss and that therefore it was just and equitable to all that the partnership should be dissolved.

The case went to trial on nine issues some of which seemed to have been framed with the intention of attempting to fix responsibility for the present unhappy state of the business on either Mr. Hogg or Mr. Browne. The substance of the learned Judge's answers I think amounts to this : that whilst quite definitely Mr. Browne has not ruined the business none of the partners are free from their share of responsibility for a situation which brought about as it may have been to a large extent by external circumstances beyond their control has been accentuated in its gravity by serious errors in business management ; that I think on the evidence led before the learned Judge was a correct conclusion. On one issue, namely, as to whether Mr. Browne had lost confidence in Mr. Hogg the learned Judge did make an error but it was a highly technical error which by itself cannot vitiate the decree for dissolution if otherwise the granting of the decree be founded on just principles. We are thus brought again to the crucial issue in this case as to whether this school can continue under its present partnership with any reasonable prospect of profit. If the answer be rightly in the negative, then from the language of the statute

that is by itself clearly a ground for dissolution and the Courts have so acted. (*Jennings v. Baddeley*[1]; *Bailey v. Ford*[2]; and *Wilson v. Church*[3]).

The learned District Judge has no difficulty in coming to a conclusion adverse to the defendants-appellants on this issue and neither have I. Mr. Obeyesekere has insisted that a business which can and has met its trading liabilities cannot be said to be insolvent and that it is unsound to include as loss depreciation in fixed assets which are due to what may be a temporary adverse market. On the latter point learned Counsel for the plaintiff-respondent cited to us the case of *The Spanish Prospecting Co., Ltd.*[4], which although not directly in point contains in the judgment of Fletcher Moulton L.J. such a lucid exposition of the meaning of the term "profits" that it will I think bear quoting :—

> "The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. For practical purposes these assets in calculating profits must be valued and not merely enumerated. An enumeration might be of little value. Even if the assets were identical at the two dates it would by no means follow that there had been neither gain nor loss, because the market value—the value in exchange—of these assets might have altered greatly in the meanwhile. A stock of fashionable goods is worth much more than the same stock when the fashion has changed. And to a less degree but no less certainly the same considerations must apply to buildings, plant, and other fixed assets used in the business, because one form of business risk against which business gains must protect the trader is the varying value of the fixed assets used in the business. A depreciation in value, whether from physical or commercial causes, which effects their realizable value is in truth a business loss . . . ."

Now if one looks at the affairs of this partnership with this definition of "profits" in mind, the parlous condition of this business is at once apparent. It is burdened with heavy debt charges, its goodwill has dwindled to nothing, its fixed assets owing to the general fall in land values in the district have depreciated heavily and are now valued by Mr. Vandersmaght at a figure which represents about a fourth of the value given them in 1933. At their present value the land and buildings together stand according to Mr. Vandersmaght at a figure some twelve thousand rupees short of the mortgages on them. Furthermore, according to the evidence of Mr. Hall, a consulting engineer, they are in such a state

[1] *3 Kay and Johnstone 78.*
[2] *13 Simon's Rep. p. 496.*
[3] *13 Chan. Div. p. 1.*
[4] *(1911) L. R. 1. Chan. Div. p. 92.*

of disrepair that it would cost about Rs. 30,000 to bring them into a satisfactory condition. That buildings should be in a good state of repair is necessarily of great importance in the case of a school.

Along with these adverse factors there has been the serious drop in pupils already referred to. That all the parties have recognized the seriousness of the position is clear from the correspondence and Mr. Hogg himself as the business manager proferred what has been called a reconstruction scheme in November, 1938. The scheme is based on the somewhat speculative hypothesis that a reduction in the school fees will bring about an increase in the number of pupils. On this assumption and with economies in staff and salaries the scheme is able to show a paper profit but it is a scheme which makes no allowance for depreciation of the fixed assets, nor does it provide for the creation of a fund from which to pay off the mortgage debts. In a word it repeats the same financial errors which has contributed to bring the business to its present state.

A good deal of time was taken up at the trial by attempting to assess the factors responsible for the school's decline in prosperity. It is not necessary to examine these in detail. If some of the attributed causes appear petty it must not be forgotten that parents are sometimes as difficult to catch as the trout in the streams of Nuwara Eliya, and the assignment of reasons for their disinclination to bite may be just as difficult.

One cause however is clearly important, namely, the competition of the Convent which did not exist in the prosperous times before Mr. Hawkins' death but which is now continuing. For obvious reasons this competition presents a real difficulty to the school. It is the old story of the concern with high overheads being unable to compete with the products turned out by a rival establishment whose overheads are low or with imports from a country where labour is cheap.

It is clear from the judgment of the learned trial Judge that he had all these facts in mind and that on the evidence he was justified in finding that the business of the partnership could only be carried on in the future at a loss. That being so, the learned Judge had a discretion to order a decree of dissolution and it cannot be said that in exercising this discretion he has acted unjudicially or clearly contrary to justice and equity. The plaintiff-respondent may stand to lose most by a continuance of the partnership because he alone has paid up his partnership interest in full and being a man of some means he would be likely to find himself called upon to meet the increasing liabilities. Furthermore, the somewhat ostrich-like attitude of the other partners can in the long run bring them no benefit. As a day of reckoning must come, it is in the ultimate interest of everyone that it should come early rather than late.

I would accordingly dismiss the appeal with costs.

SOERTSZ A.C.J.—I agree.

Appeal dismissed.