

Present: De Sampayo J.

1922.

SILVA *et al.* v. FERNANDO.

60—C. R. Colombo, 83,401.

Action by persons trading in partnership to recover money due from a servant of the business—Partnership agreement not reduced to writing—Is action maintainable?

The plaintiff, alleging that they were carrying on business in partnership, sued the defendant, their servant, to recover a sum of money found, on account being struck, to be due from him. The Commissioner dismissed the action, as there was no writing to establish the partnership.

Held, that the dismissal was wrong. The action was one purely between masters and servant, and the plaintiffs did not seek to establish a partnership so far as the defendant was concerned.

THE facts appear from the judgment.

Samatawickreme (with him *Chas. de Silva*), for the appellants.

Schokman, for respondent.

July 17, 1922. DE SAMPAYO J.—

An unnecessary difficulty has been raised in this case which appears to be a simple one. Three plaintiffs, the third plaintiff being the second plaintiff's husband, sued the defendant for the recovery of a sum of Rs. 300. They allege that the defendant was employed by the first and second plaintiffs as their servant, and was entrusted with certain moneys in connection with the business they carried on at a certain place. They further go on to say that the defendant has quitted their service, and on his leaving an account was struck, and a sum of Rs. 309 was found to be due from the defendant to the first and second plaintiffs. Waiving Rs. 9, they restrict the claim in this action to Rs. 300. All the trouble has arisen from an unnecessary allegation made by the plaintiffs in their plaint. For, after giving their respective residences, the first and second plaintiffs said that they were traders carrying on business in partnership at No. 41, Galle road, Wellawatta. This was an entirely unnecessary allegation so far as the defendant was concerned. That allegation has nothing to do with the claim made. The action was one purely between masters and servant, and no question of law could possibly have arisen for want of any writing to establish a partnership under section 21 of the Ordinance No. 7 of

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1840, but the point was raised on behalf of the defendant in the course of the action, and was upheld by the Commissioner, and the plaintiff's action was dismissed. The words of the section referred to clearly show that it has no reference whatever to an action of this kind. It provides that no promise, contract, bargain, or a agreement shall be of any avail unless it be writing for certain purposes, among others "for establishing a partnership where the capital exceeds one hundred pounds." The plaintiffs did not seek to establish a partnership, so far as the defendant was concerned. There was no contract, promise, or bargain, which had to be proved in the case, for establishing a partnership. In this connection Mr. Samarawickreme, for the plaintiffs, refers me to the judgment of Wood Renton C.J. in *Silva v. Silva*.¹ There the action was to enforce a trust which was in respect of a land which was purchased in the name of one partner out of moneys belonging to the partnership. An objection was taken that the action could not be maintained in the absence of a writing as required by section 21 of the Ordinance No. 7 of 1840. The Chief Justice made this remark: "As at present advised, I do not think that there is anything in section 21 (4) of the Ordinance No. 7 of 1840, or in the decision of the Privy Council in *Pate v. Pate*,² to exclude such proof in this case." The action is not one to "establish a partnership," and the evidence to which exception is taken merely enters into it incidentally as part of the *res geste*. I think the case should have been heard on evidence. The order of dismissal is set aside, with costs, and the case sent back for trial in due course.

Sent back.