[PRIVY COUNCIL.]

1925.

Present : Viscount Haldane, Lord Blanesburgh, and Lord Darling.

SOOSIAPPA PILLAI *v.* BASTIAN FERNANDO.

D. C. Colombo, 4,133.

Partnership deed—Agreement for three years—Collateral memorandum—Interpretation.

A partnership for carrying on the business of landing and shipping agents was constituted, for a period of three years, between two persons by deed No. 740 dated January 30, 1914. On December 11, 1914, one partner assigned to the other his share of the business for a certain consideration. The deed of assignment was accompanied by a memorandum in the following terms :—

" I, H. B. F. . . . . do hereby promise and agree to grant to P. de S. W. . . . . one-third share of the profits that may be earned by the ' Colombo Landing and Shipping Agency ' in the business carried on under deed No. 740 dated January 30, 1914 . . . ."

Held, that the profits earned during the period of three years fixed by the partnership deed were alone within the contemplation of the parties as the subject matter of division.

APPEAL from a judgment of the Supreme Court. The facts are fully stated in the judgment of the Judicial Committee of the Privy Council.

October 20, 1925. Delivered by LORD BLANESBURG :—

One question only—and that a short question of construction—remains to be determined on this appeal. Other issues raised by the appellant and discussed, albeit somewhat cursorily, by counsel before the Board have not survived that discussion. But some reference to them will tend to a fuller appreciation of the reasons which have led their Lordships to the conclusion they have reached on the remaining question between the parties.

The matters in contest arose between the respondent and a Mr. Peter de Silva Wijeyeratne, now referred to as the insolvent, his interests in these proceedings being represented by the appellant, his present assignee in bankruptcy. They arose upon the purchase by the respondent on December 11, 1914, of the insolvent's interest in a business of landing and shipping agents at Colombo, which, since the beginning of that year, had been carried on by the two in partnership under the style of " The Colombo Landing and Shipping Agency."

1925.

LORD BLANESBURG

Soosiappa Pillai v. Bastian Fernando

The deed constituting the partnership is dated January 30, 1914, and it is convenient here to summarize some of its relevant provisions. The capital of the firm was to be Rs. 150,000, contributed by the partners in equal shares. The partners were to be equally interested in the capital and property of the business. The term was one of three years from January 1, 1914—no extended time was ever agreed to but either party might at the end of the first or any subsequent year retire from the partnership on three months' notice, whereupon the partnership was to determine—the retiring partner being entitled, if the continuing partner elected to purchase it, to have repaid to him his share in the capital and property of the partnership, in lieu of current profits an allowance of 9 per cent. per annum on the amount of such share, calculated, if this happened during the first year, from the commencement of the partnership. No value was to be placed on the goodwill of the business as a partnership asset, and the retiring partner was to bind himself for twenty years from the date of his retirement to refrain, directly or indirectly, from carrying on or being concerned or interested in the business of landing and shipping agents as principal, agent, manager, traveller, or servant, in Colombo.

The partners were by turns each for one year to manage the business, and for the first year the management was committed to the insolvent. The business in that year was not successful. It is common ground that serious trading losses were sustained, and it seems clear that for some adequate reason, the precise nature of which, however, remains doubtful, the insolvent was desirous of being relieved of his responsibilities in relation to this particular venture. On September 16, 1914, he addressed to the respondent a letter which, unless it meant a great deal more than in terms it says, was quite otiose in view of the provisions of the partnership deed on the subject :—

> " Referring to the agreement entered into between both of us," it says, " I hereby give three calendar months' notice as managing partner, that you do relieve me of the responsibility of managing the business of the Landing and Shipping Company from January 1, 1915."

Their Lordships do not say that this notice was either operative or actually intended to terminate the partnership on January 1, 1915, but they have little doubt that the negotiations for the purchase by the respondent of the insolvent's share, which immediately followed, were embarked upon with the view of bringing about that result on terms somewhat less onerous to the insolvent than those fixed by the provisions of the partnership deed in that behalf.

Mr. J. A. Perera, originally introduced by the insolvent, had acted as notary for both parties in the preparation of the deed of partnership, and in the supervening negotiations he acted in the same

capacity. These culminated in the deed of assignment of the insolvent's interest in the partnership executed on December 11, 1914, along with an accompanying memorandum, the true effect of which is the question now remaining for decision.

By that deed in consideration of the payment of Rs. 55,000 to the insolvent and of the assumption by the respondent of all the debts and liabilities of the partnership and of an indemnity against all claims and demands in respect thereof, the insolvent assigned to the respondent all the " estate, right, title, interest, claim, and demand whatsoever of him (the insolvent) in and to the said partnership business."

The accompanying memorandum was in the terms following :—

" I, the undersigned Hettiakandege Bastian Fernando, of 'Deyncourt,' Colpetty, in Colombo, do hereby promise and agree to give to Mr. Peter de Silva Wijeyeratne, of Castle street, in Colombo, one-third share of the profits that may be earned by the 'Colombo Landing and Shipping Agency' in the business carried on under deed No. 740 dated January 30, 1914, attested by Mr. J. A. Perera, Notary Public.

Colombo, December 11, 1914. (Signed) B. FERNANDO.

Now, while the true effect of that memorandum is the question which remains for consideration, many others were discussed in the Courts below. The circumstances in which the memorandum was executed, its true intent and purpose—these were the serious issues in the suit. The case of the appellant with regard to them was that to the knowledge of the respondent the insolvent was on the verge of bankruptcy in December, 1914 : that the purchase of his share was carried out then to protect the business and the respondent's interest in it from the interference of the insolvent's creditors : that the memorandum, not, like the deed of assignment, an attested notarial instrument, embodied an arrangement, designed to be concealed from these creditors, effective to provide a fund for the insolvent personally and thus to supply an inducement for him to execute the deed. In short, it was a fraud upon the creditors of the insolvent, instigated by the respondent and Mr. Perera, his notary, and it was claimed that the whole transaction should accordingly be set aside and declared of no effect in law.

It is noteworthy that a case so serious was only introduced into the proceedings by an amendment made seven months after the suit—originally merely one for an account—had been instituted, and it is not surprising that the insolvent was beset with many difficulties in making it out. First of all the memorandum in question was in fact the work not of Mr. Perera, but of Mr. Fernando, a notary who, as it happened, taking Mr. Perera's place at the execution of the purchase deed, himself there and then prepared the memorandum for signature by both parties as a document embodying a term of the bargain between them which had been overlooked by Mr. Perera.

1925.

LORD BLANESBURG

Soosiappa Pillai v. Bastian Fernando

To Mr. Fernando no intimation was ever given that the document was intended to be secret and, in fact, he, as proctor for the insolvent in the subsequent insolvency proceedings—which it may be observed did not supervene for some months—actually took the advice of counsel upon the question whether, as no profits had been received or were in prospect, it was necessary to include the memorandum in the insolvent's statement of affairs.

Nor had the suit, so far at least as this charge was concerned, a genuine appearance. It was only in 1922 that it was commenced, and not only did the insolvent in the course of it go out of his way to proclaim his own turpitude, but it appeared that his original and responsible assignee in bankruptcy had refused to take the case up, and it was being carried on by a new assignee introduced for the purpose and financed by the insolvent's wife, all instructions being given personally by the insolvent himself. This procedure becomes more intelligible when it is added that at the moment the suit was commenced the insolvent's creditors, disappointed with the result of the insolvency proceedings, were threatening the insolvent with punitive proceedings :—

> " The insolvent's liberty is now in jeopardy," says the trial Judge in his judgment, " and this action is, I have no doubt, engineered and financed by him to postpone the evil day."

But while the appellant's case was so beset, it did derive some assistance from the fact that the substantive answer put forward by the respondent did not, in all particulars, commend itself to either of the Courts in Ceylon.

They did not accept his story that the memorandum which had in fact come into his possession, had been returned to him by the insolvent as part of an arrangement under which all claims in respect of it were renounced, although it must be added that the insolvent's circumstantial story that the memorandum was returned by him to Mr. Perera, acting for the respondent, and at his urgent request on the very evening of the day of its signature is probably at least equally unreliable in view of the terms of Ex. P. 5, written subsequently by Mr. Fernando on the insolvent's personal instructions.

Both Courts, however, took the view, and their Lordships are in entire agreement with them, that there was not shown on the part of the respondent in relation to this memorandum any intent or desire to defeat or delay the insolvent's creditors. Any fraud in connection with the transaction is to be found only in the insolvent's interested and belated discovery of its existence. The evidence appears very clearly to indicate that the transaction to him was a highly beneficial one. A full price for his share in the business was paid and he was relieved of all its liabilities, which were heavy. If

the whole arrangement had been contained in one instrument—instead of being embodied in two—it is manifest that no kind of objection to it could even have been suggested either by the insolvent or his creditors.

In these circumstances, as the creditors now have the full benefit of the memorandum the only question which remains is as to its true effect. Does it, as contended by the appellant, mean that the respondent is to account to him for one-third share of the profits of the business referred to so long as it may be carried on by himself, or does it mean, as contended by the respondent, that the period of accounting came to an end on December 31, 1916, the date when the original term fixed by the deed of January 30, 1914, came to an end. Both Courts in Ceylon have taken the respondent's view. Their Lordships agree with it.

The question is whether the reference in the memorandum to "the business carried on under deed No. 740 dated January 30, 1914," is made only for the purpose of defining the business in which the divisible profits are to be earned or is made for the purpose also of importing the period during which a share of them is to be accounted for.

In determining this question it must not be forgotten that the effect of the assignment of December 11, 1914, was to bring the partnership between the parties to an immediate end and to abrogate *as from the date of its execution* every provision of the deed of January 30, 1914. Failure to appreciate this fact makes it easier to place upon the memorandum the construction adopted by both of the Courts in Ceylon. But giving to that consideration full effect the result, in their Lordship's judgment, still remains the same.

If the only object in referring to the deed of January 30, 1914, was to define the business to which the memorandum relates, it seems to their Lordships impossible to limit the obligation as the appellant would, to the period when the business was being carried on by the respondent. The "Colombo Landing and Shipping Agency" had never been and need never be synonymous with the respondent alone, and the construction contended for by the appellant leads necessarily in their Lordships' view to a conclusion which if only in the light of the provisions made in the same event by the partnership deed is quite extravagant. On the other hand, the extreme precision with which that deed is referred to in the memorandum, the fact that the purchase of the insolvent's share had led to a premature determination of the association fixed by it, the likelihood that the respondent would work out by himself the term during which the association of the respondent had thereby been contemplated and the circumstances in which the memorandum was prepared—all these considerations lead their Lordships irresistibly to the conclusion that profits earned during the three years fixed by the partnership deed were alone within the contemplation of the parties as subject matter of division.

1925.

Lord Blanesburg

Soosiappa Pillai v. Bastian Fernando

The learned Judge of the District Court of Ceylon took this view, but by his order of July 26, 1923, he dismissed the action on the ground that the appellant had not proved that any profits were earned during the period in question. The Supreme Court of the Island, taking the same view of the meaning of the document held, and as their Lordships think, rightly, that the appellant was not bound to prove at the hearing that profits had been earned, but was entitled on proper terms to have an account taken to ascertain their amount, if any, due regard being had to all questions of limitation. And on February 4, 1924, that Court made an order giving effect to its views.

In their Lordship's judgment that order was in all respects correct. The present appeal from it is misconceived, and their Lordships will humbly advise His Majesty that it be dismissed, with costs.

Appeal dismissed.