Present: Mr. Justice Middleton and Mr. Justice Grenier.

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PATE *v.* PATE *et al.*

D. C., Kandy, 16,307.

Partnership—Capital over Rs. 1,000—Proof—Parol evidence—Executed contracts—Executory contracts—Ordinance No. 7 of 1840, s. 21.

In an action between partners for an account of the partnership, the capital of which exceeded Rs. 1,000, and which was not constituted by any deed of partnership,—

Held, that the prohibition against parol evidence contained in section 21 of Ordinance No. 7 of 1840 applied only to executory contracts, and that parol evidence was admissible to prove a partnership already dissolved for the purposes of an action for the settlement of partnership accounts.

D. C., Kandy, 52,568 followed.

APPEAL by the plaintiff and the second defendant from a dismissal of an action for an account of a partnership from the first defendant. The facts sufficiently appear in the judgment of Middleton J.

Sampayo, K.C. (with him *H. J. C. Pereira*), for the plaintiff, appellant.

Walter Pereira, K.C., S.-G. (with him *F. J. de Saram*), for the second defendant, appellant.

Bawa (with him *Van Langenberg*), for the first defendant.

Cur. adv. vult.

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This was an action in which the plaintiff, an alleged partner with the first and second defendants and one McClay, deceased, testator and husband of the third defendant, prayed for an account of the

[1] *(1871) Vanderstraaten 195.*

partnership transaction from the first defendant. The second defendant, admitting the alleged partnership, prayed in reconvention for dissolution and an account as between the partners and from the first defendant. The third defendant admitted that McClay had a share in the alleged partnership, but pleaded that he had sold his share to the first defendant in February, 1900, and, disclaiming interest, prayed the dismissal of the action.

The learned District Judge dismissed the plaintiff's action, and the plaintiff and second defendant appealed. The third defendant did not appear on the hearing of the appeal. No order or decree appears to have been made on the claim in reconvention by the second defendant.

The undisputed facts were that a syndicate was formed on or about December 24, 1897, by the plaintiff, first and second defendants, and one McClay, to take over the working of the coach line from Matale to Jaffna and Dambulla to Trincomalee, that each member was to contribute Rs. 10,000, and that the plaintiff, who had been working the line before the syndicate took over, was to have his stock-in-trade of coaches, horses, &c., taken over by the syndicate. Each party to be entitled to the profits in equal shares.

No partnership deed was drawn up in writing, and it was pleaded as matter of law by the first defendant that the plaint disclosed no cause of action, inasmuch as it was not alleged that the agreement relied upon was in writing.

The second defendant pleaded that the first defendant had by false representation in October, 1899, induced him to accept an amount equivalent to the capital of Rs. 10,000 he had contributed, and, alleging that he had not on that account ceased to be a partner, averred that the first defendant was stopped from denying it by his admission on a balance sheet sent to the second defendant by him in October, 1900, of the second defendant's status as a partner, and claimed in reconvention.

The learned District Judge decided the question of law by the first defendant against him, and, although he had not appealed on this point, his counsel claimed to re-argue the question before us, and we allowed him to do so under section 772 of the Civil Pocedure Code, upon the ground that he was supporting the decree on a ground of law decided against him in the Court below.

It was argued by counsel for the respondent that D. C. Kandy, 52,568, decided by Creasy C.J., Temple and Lawson J.J., and reported at page 195 of *Vanderstraaten's Reports*, does not conclude as in the present case, or in the alternative that it can be differentiated fom the present case.

The decision in that case was held by the District Judge to be binding on him here, and, in my opinion, the ruling in that case, which has been consistently followed, with the exception perhaps of the case in 1889 reported in *1 S. S. C. 120*, since 1871, is not only

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binding on us by the sanctity of long usage, but by the ruling laid down by the Full Court in the case of *Rabot et al. v. De Silva et al.*[1]

It appears that in *Mendis v. Peiris*,[2] Burnside C.J. again upheld his own views of the section expressed in *6 S. C. C. 120*, which were dissented from by Clarence and Dias JJ., who had already followed the case reported in *Vanderstraaten* in *Bawa v. Mohamado Casim*.[3]

As regards the construction of section 21 of Ordinance No. 7 of 1840, I am willing to accede to the view of the learned counsel for the respondent that the word "establish" has the meaning of "create," but I think the proviso must unquestionably be read and construed with reference to the peculiar clause which enacts that in Ceylon no promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized by him or her, shall be of force or avail for establishing a partnership where the capital exceeds £100. If so, it is impossible to give the proviso the meaning sought to be engrafted on it by the argument of the learned counsel, that partners in the latter part of the proviso mean partners according to law under a partnership created in writing according to law. If that restricted meaning is given to the proviso, its terms would be redundant and unnecessary.

Again, if the illustration adopted by Mr. Bawa of a partner in piece goods partnership trading in plumbago without the authorization of the partnership deed be considered, I agree that parol testimony concerning transactions by, or the settlement of, any account between the partners as regards plumbago might be proved by parol testimony, if, as regards the plumbago, they had dealt as, and it was a question as to their rights as, partners, and one of them had sought to take advantage of his own wrong on the plea there was no legal partnership.

If it was not a question as to their rights as partners as regards the plumbago, oral testimony would, of course, be admissible to prove the transaction between them so far as it was properly relevant thereto.

I think it is necessary in this case to say what, in my opinion, is the effect of the ruling in the case in *Vanderstraaten* so far as the report enables me to do so.

The facts there were an alleged partnership which could not be established in writing, which had been executed as a partnership and terminated in some way or another, it is not stated how, leaving an alleged balance of account due from the defendant to the plaintiff on the alleged partnership accounts.

The Court held that the last words of the proviso appeared to apply precisely to cases like that before the Court, and that unless they did so they were unmeaning and inoperative.

[1] *(1907) 10 N. L. R. 140.* [2] *(1891) 1 C. L. R. 98.*
[3] *(1891) 1 C. L. R. 53.*

The Court then went on to instance a case which the section would not countenance, and one which in connection with the proviso it would countenance. "For instance, if there were a verbal agreement between A and B to be partners for seven years, and A at the end of the first year refused to carry on the partnership any longer, B could not compel him to do so. The verbal agreement would not in such a case establish the partnership. But if, when the partnership has in fact been carried out and terminated, there is on the balance of accounts a sum due from one partner to another, the proviso in the Ordinance clearly enables the plaintiff to prove his case by parol evidence, as well regard to the fact that a partnership had existed as with regard to the balance due."

It did not, I take leave to think, hold, as Dias J. appears to consider in *Bawa v. Mohammado Cassim*,[1] that the prohibition against parol evidence only applied to executory contracts.

I am inclined to think it might apply to a partly executed oral contract of partnership, where the assistance of the Court was sought to compel an alleged partner to perform by proceedings for specific performance or by action for breach of contract some act he had orally agreed to perform. In such a case although the contract was not an executory one, the plaintiff would be, I think, successfully met by the answer: "You must establish your contract in writing," and the proviso does not apply.

I think also that the decision contemplates the termination in some form of the executed oral agreement of partnership as a necessary element to bring the proviso into play.

The law applicable to partnership matters here is the law of England, and a partnership thereunder is dissolved *ipso facto* by death, in the absence of agreement to the contrary. No partner, moreover, could retire from the partnership except with the assent of the other partners.[2]

In the present case the four alleged partners in the syndicate not being bound in writing could have terminated the arrangement at will at any moment by notice, or by ceasing to take part in the transactions of the partnership, or by withdrawing their capital; or, by obstructing the other partners in the performance of their presumed obligations, might have brought the arrangement practically to an end at any moment, so far as the rights of the partners *inter se* were concerned.

There was nothing in law to prevent any partner withdrawing the whole of his capital if he could get it out of the business at any time, or to prevent his divesting himself of the character of partner as regards his other partners whenever he thought fit to do so.

A partner might have rendered himself liable to third parties, but he had no liability to his alleged partners, except by bringing into play the proviso under the section.

[1] *(1891) C. L. R. 53.*

[2] *Lindley 456.*

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In determining the rights and obligations of the members of this syndicate, I think, however, the only law that we can properly apply in dealing with them under the proviso is that which would have bound the parties had they complied with the obligatory statutory enactment of putting their agreement into writing, viz., the English Law of Partnership.

If, therefore, we hold that the learned District Judge's decision on the facts is not warranted on the written evidence, we shall, I think, then be bound to consider the case of the parties as if they had entered into a partnership agreement in writing, and, annexing to their association all the incidents which are understood to apply to a partnership agreement not in writing, endeavour to formulate an order by which the rights of the parties may be determined upon an accounting between two definite dates, and also *inter se*.

The first question raised on appeal on the facts was whether the District Judge was wrong in holding as subsidiary to the 5th issue ("whenever the plaintiff retired from the partnership in 1898") that the plaintiff's stock-in-trade on the old coach line was to be taken over at a valuation and credited to him at its value, or whether it was to be passed in the books at Rs. 10,000.

The evidence on which the District Judge has acted is set out in his judgment, and the learned counsel for the plaintiff-appellant relied mainly on G W 2, the evidence of the plaintiff at pages 10, 11, 12, documents C H P 10, C H P 16, C H P 17, the evidence of White at pages 26, 27, and 34, G W 3, G W 4, commenting also on D 20, D 21, A P 17, and A P 18, as showing that the District Judge had overlooked matter material to be considered.

It is true the Judge does not refer to the evidence and documents relied on, but he heard and saw all the evidence, and has expressed an opinion as to the reliability of second defendant's evidence, which seems warranted by the facts.

I have taken into consideration the entry on the left-hand side of C H P 17. This was made by Perera at Stewart's (p. 22) request while first defendant was absent from the Island. The first defendant admits, however (pp. 21, 22), that plaintiff's son Charlie posted the book in which C H P 7 appears up to the end of 1898, and that it had been in the first defendant's possession since January or February, 1899. This shows acquiescence by the first defendant in plaintiff's share being taken at Rs. 10,000.

It was evident both in G W 1 and D 19 that the second defendant thought the plaintiff's stock was to be taken in at a valuation, and G W 2 may be construed to some extent the same way, although counsel for the plaintiff has put a different construction on it. It was valued twice, and the Judge with some reason says that this would not have been done had it not been intended to take it into the business at its valuation.

The first defendant in C H P 10 says: " The stock, however, taken over from Charles came to only Rs. 7,695, and this was arrived at giving him a lot of advantages, " although on receipt of the draft deed from plaintiff he does not seem to have protested against the plaintiff's valuation of his share in it, or to have traversed directly the plaintiff's assumption. It is significant also that no protest was made by the plaintiff in respect to the valuation.

The fact that the difference between the valuation and the capital of Rs. 10,000 was not debited to the plaintiff at the time is a strong and important piece of evidence, but it may be accounted for by the careless manner in which the books were kept or by an uncertainty at the time as to what was to be done. It is not at all improbable that it never was distinctly agreed how the plaintiff's share was to be computed. There is no doubt the burden was on the plaintiff to prove that his stock was taken over at a value exceeding its valuation, and I do not think he can be considered to have discharged that burden in its entirety. I would therefore uphold this finding of the District Judge only so far as it might affect McClay. As against the first defendant, he was at first very willing to give the plaintiff the fullest benefit of his stock-in-trade and I hold that he (first defendant) acquiesced in the share of the plaintiff being entered on the books at Rs. 10,000, and must be taken to have agreed to that course. As regards the second defendant he has admitted in his evidence at pages 26 and 27 that first defendant and he agreed to give plaintiff two shares in Rs. 10,000 in the syndicate for the value of his plant.

As regards the main part of the 5th issue as to the plaintiff's retirement in 1898, I am afraid that I am unable to agree with the learned District Judge. In the first place, there is no evidence showing any definite intention to retire and to cease connection with the business, and the drawings, which apparently ceased between December, 1898, and May, 1899, may only indicate that the plaintiff had then drawn as much as he thought justifiable, and having done so was prepared to accept whatever might happen. He was told in G W 2 by second defendant that " once the tender is accepted and the line placed in working order you will not need trouble, as Artie (first defendant) and myself will do our best to make it a success. "

I was in some doubt whenever the case did not fall under the principle *vigilantibus non domientibus subveniunt leges*, which would preclude plaintiff by his own laches from obtaining relief.

There is no positive proof of abandonment here except the inference that may arise from the drawing out of money to an amount approximately equal to the value of the share. There is no negative proof by the lapse of time from 1998 till 1900 before assertion of the claim.

Again, according to the view of the Lord Chancellor, applying no doubt the dictum from the Codex, 4, 37, 3, *in societatis contractis*

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fides exuberet in *Clements v. Hall*,[1] one partner would be held *uberrima fide* to disclose every fact which would enable the other partners to exercise a sound discretion as to the course they ought to pursue. There is no evidence that first defendant, who had the entire management of the business, ever disclosed to the plaintiff that the business had become profitable, nor, on the other hand, that the plaintiff ever asked for information. It seems to me also that the doctrine of recognition of the title of the plaintiff by the first defendant as shown by his tacit acquiescence in the plaintiff's claim to be deemed a partner after the family meeting and upon receipt of the draft partnership deed, may apply to this case (see *Penny v. Pickwick*.[2])

The drawings were at first without interest, and no security was asked for or given, while afterwards a promissory note was given to the plaintiff. This by itself does not seem to me necessarily to show that the plaintiff was withdrawing his capital, and the first defendant in G W 6 in writing to second defendant on October 6, 1900, says: " Charles, on the other hand, called in the principal invested by him "; but what is there to show that these drawings might not have been against prospective profits as alleged by the plaintiff, or loans as suggested by the first defendant in G W 6? It is not clear that because no interest was charged that he must be deemed to be withdrawing capital.

When he sought to obtain an account by C H P 2 of March 22, 1900, on the footing of a partner, he was not met with any denial of his rights as a partner, or any allegation that he had retired, by the first defendant. The reply C H P 3 of March 24, 1900, by the first defendant admitted practically the plaintiff's claimed rights, and gave an assurance of the necessary steps being taken to enable each shareholder to know his position exactly.

By C H P 9 of September 15, 1900, the first defendant admits " taking the tip " of the second defendant, as he calls it, and failing to reply to the three letters of the plaintiff of July 18, C H P 6, and C H P 7, so that apparently the defendant deliberately avoided denying the partnership interest claimed by the plaintiff, which he now disputes in this action.

Without going into the evidence of Smith at page 15 and the subsequent apparent acquiescence of the first defendant by his assenting to sign a partnership deed after his return from Australia, or criticism of its terms giving plaintiff a share equal to Rs. 10,000 in his letters G W 22 and C H P 14, I feel strongly that the learned District Judge's finding cannot be supported on the 5th issue.

In regard to the argument that plaintiff lay by until he ascertained it was worth while to re-assert his rights as a partner, it would

[1] *2 De Gex and Jones 188.* [2] *16 Beavan 246.*

seem that his letter C H P 2 was on March 25, 1900, about two years after the business was started, but he was told in G W 2 it was not necessary for him to trouble in the matter.

The learned District Judge expresses surprise that plaintiff apparently waited two years even when he thought the business was yielding the large profits of Rs. 4,000 a month, of which his share was Rs. 1,000. but the evidence of Silva at page 23 is that he did not get A P 10 till September or October, 1900, and Silva went into plaintiff's employment in March, 1900, so that the plaintiff would not have got information from Silva about the improvement in the business till March, 1900, or have had it confirmed by A P 10 till September or October.

The argument of the learned Judge, therefore, that the plaintiff must have felt he had withdrawn from the business as a partner in 1898, because he took no steps to assert himself after he became aware the business was in a flourishing condition, falls to the ground. He asserted his rights in March, 1900, soon after getting the information from Silva.

Plaintiff's counsel in his argument on this part of the case referred to defendant's evidence at page 19, A P 2, C H P 9, G W 10, G W 12, C H P 2, C H P 3, C H P 4, C H P 5, C H P 21, C H P 22, D 27, C H P 6, C H P 7, C H P 8, C H P 9, D 21. C H P 10, G W 6, G W 15, G W 16, G W 13, G W 18, G W 19, G W 22, G W 2, the evidence of first defendant at pages 19, 20, 22, C H P 11, and the evidence of Robert Logan Smith at page 15, C H P 11 and C H P 13, which I have carefully read and considered, and taking into consideration the reasons and arguments of the learned Judge in his judgment, I am of opinion that his finding on the 5th issue was wrong, and cannot be supported. I find, therefore, that the plaintiff did not retire from the partnership in 1898 or at any time.

We now come to the case of the second defendant, who sold his share to the first defendant in October, 1899. The second defendant stated in D 21 (September 23, 1900): "I have ceased to be a member of the syndicate." This was in reply to C H P 9 of September 15, 1900, in which first defendant had told second defendant he had secured himself.

The syndicate ledger G W 7A, kept under the first defendant, shows Rs. 20,000 carried to capital account, debiting the second defendant. In G W 6 the first defendant on October 6, 1900, writes to the second defendant: "the capital account is untouched, and the Rs. 20,000 appearing to your debit is Rs. 10,000 paid you and Rs. 10,000 paid Charlie. Your name appears for two shares in the capital account, equal to Rs. 20,000."

The learned District Judge is therefore slightly in error as to the date in his answer to the 8th issue, which was whether the first defendant admitted in October, 1900, not September, that second defendant was a partner.

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In G W 16, dated October 27, 1900, the first defendant again wrote to the second defendant that his name still appeared in the books for two shares, and in G W 18, dated October 30, 1900, the first defendant writes to the second: " What was there to prevent me on the strength of these withdrawals and renunciations to have ceased to recognize you as partners, " thereby implying that he had not so ceased. From the same letter the first defendant was willing to have the partnership deed drawn out on his return from Australia on condition that he had the money due to him, and that he drew money to the value of his share. The learned Solicitor-General further relied on C H P 21, C H P 24, C H P 22, the evidence of the first defendant—page 22, and C H P 9.

I do not think it is open to the second defendant to set up the plea of want of notice to other partners. As McClay's agent, the first defendant had notice on his behalf, and it surely lay on him to give notice to the plaintiff of his intention to withdraw his capital if he desired and intended to do so.

In G W 24A of November 2, 1900, the second defendant expresses very clearly and emphatically that, after waiting " twenty months, and when there appeared no chance of getting anything out of the concern, he had been willing to get out of the business by getting his money back, and had determined to wash himself of the concern. " In the same letter he declares his confidence in the first defendant, and acquits him of all meanness or treachery in regard to the non-disclosure of the state of the business.

It is impossible to say that the second defendant at that time had not in his own opinion, and in full view of possibilities of there having been profits in the business, entirely withdrawn from the concern. Is he now to be permitted to say that he did not sell his share to the first defendant because he himself gave no notice to the plaintiff, or because the first defendant has subsequently to the claim raised by the plaintiff shown a disposition to recognize him as a partner if he were permitted to draw an amount equal to his share?

On the question of *uberrima fides*, as it affects his non-disclosure by the first defendant to the second defendant that profits existed, the second defendant seems to have waived his right of inquiry into the state of the partnership (see on this point G W 24A.)

The letter D 22, D 23, D 24, D 25, and D 26, dated August 6, 1899, to October 23, 1899, all seem to point to a keen anxiety on the part of the second defendant to dispose of his share without any inquiry as to whether there were profits or losses.

In D 13, on October 26, 1899, the first defendant in writing to the second defendant stated he did not know how matters stood with regard to accounts, and in fact was in the clouds about it.

In D 14, on November 3, 1899, in reply to it, the second defendant said: "I sincerely trust the line is doing well." There is apparently no letter in evidence from the second defendant to the first defendant

until D 27 of March 27, 1900, in which he says: " Have told Charles I have no interest in the concern, and actually not having. Lassie tells me McClay has also been paid back his money, so I presume his interests have also ceased; if so, you would only have Charles to deal with, who could be easily managed. "

C H P 9 of September 15, 1900, shows that first defendant considered then that both second defendant and McClay had drawn their capital and secured themselves. Plaintiff also says in his cross-examination at page 13 that second defendant told him in October, 1900, " I am afraid I have already retired. I cannot help you " and that he may have told him so before D 27 was written in March, 1900.

I see no reason, therefore, on the arguments used before us, to disagree with the learned District Judge, who thought that the first defendant was willing to take the second defendant back into the business as a matter of grace and not of right. I do not think that first defendant's acquiescence in the partnership deed being drawn up with the second defendant as a partner, subject to his claim to draw as much money from the business as the other partners had drawn, amounts to such a recognition of the second defendant's right as would estop the first defendant now from asserting that second defendant has no legal right.

I draw a distinction between second defendant's and plaintiff's case, inasmuch as the first defendant never negatived the claim of the plaintiff in the way he negatived the claim of the second defendant in C H P 9, nor, did the plaintiff ever make the admissions of withdrawal from the business that the second defendant did in D 21 and D 27. I think therefore that the finding of the District Judge on the 3rd and 8th issues against the second defendant should stand. It becomes unnecessary therefore, under the circumstances, to consider the question as to second defendant's claim in reconvention. As regards McClay, his legal representative disclaims all share in the partnership business.

The order of the District Judge will therefore be set aside so far as it affects the plaintiff and first defendant, and judgment will be entered for the plaintiff with costs in the Court below and of this appeal against the first defendant. The order of the District Judge will stand as to the third defendant's costs in the Court below, and the second defendant will further pay his own costs and half the costs of the first defendant both in the Court below and of this appeal.

The order will be that an account be taken from February 1, 1898, to September 15, 1903, the date of the notice sent by the plaintiff's proctors to the first defendant. In taking this account the first defendant must be allowed a salary of Rs. 200 per mensem, as admitted by the plaintiff (page 11), during the whole period.

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If it is clear on the accounts or agreed whether the first defendant purchased the shares of the second defendant and McClay out of the partnership funds or out of his own pocket, issues must be settled and tried on these points.

If it is clear that the second defendant and McClay were paid off out of partnership proceeds, the plaintiff and first defendant became each half owners of the partnership business.

If it is clear that the first defendant purchased the shares of one or both of the other two partners out of his own money, he will, of course, stand in their shoes in respect of each such share.

In distributing the proceeds of the partnership, the first defendant must be permitted before they are divided to take a sum equal to the sum shown by the books to be drawn out by the plaintiff as against profits up to the end of 1898, with legal interest thereon from January 1, 1899, to September 15, 1903.

GRENIER J.—

I agree to the order proposed by my brother Middleton. I have nothing to add to his observations in regard to the question of law raised by the first defendant. In my opinion, the District Judge was right in following the judgment of the Full Court in D. C., Kandy, 52,568.[1] That judgment has been, as remarked by my brother, consistently followed, with a solitary exception to be found in *6 S. C. C. 120*. Indeed, I was strongly of opinion, when Mr. Bawa desired to re-argue the question, that it was not open to him to do so in view of there being two collective rulings on the subject, and that as the question had thus been authoritatively settled, we had no alternative but to follow those rulings.

On the facts I agree that the District Judge was wrong in holding that the plaintiff had at any time withdrawn from the partnership; and that he is entitled to an account from February 1, 1898, to September 15, 1903.

Appeal allowed.

1 *Vanderstraaten 195.*