*Present :* De Sampayo J. and Schneider A.J.

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MOHAMED *v.* WARIND.

*52—D. C. Colombo, 47,478.*

*Partnership—Action by plaintiff for declaration that he is partner—Writing not signed by plaintiff, but signed by defendant—Continuance of business after expiration of term—Is new writing necessary ?—Assignment of interest of one partner—Is writing necessary ?*

The plaintiff brought this action alleging that he and the defendant on August 5, 1909, agreed to carry on business in partnership, and that the defendant since February 8, 1915, refused to acknowledge the plaintiff as his partner, and appropriated to himself the capital and stock in trade of the said business to the plaintiff's loss, and he prayed for a declaration of his rights as partner, for dissolution of the partnership and realization of the assets, and for a partnership account. The defendant denied the alleged agreement, and stated that if there was such an agreement, the partnership was dissolved prior to the acts complained of against him. He further pleaded that if the plaintiff at any time had any interest maintainable at law in the said business, he made over the same to the defendant for good consideration.

*Held*, that though the writing (see judgment) relied on as constituting the agreement of partnership was not signed by the plaintiff, but only by the defendant, that plaintiff was entitled to rely on it for establishing a partnership as against the defendant.

The partnership agreement provided that "the business shall be carried on even after the expiration of this deed (five years) if we agree."

*Held*, that this amounted to an agreement that the partnership shall be continued if the members do not wind up the business at the expiration of the period of five years, and that no further writing was required if they continued to carry on the business.

*Ramen Chetty v. Vyraven Chetty* [1] distinguished.

The plaintiff in 1916 assigned his share in the partnership to the defendant, but no deed of assignment or other writing was executed.

*Held*, that the assignment was valid, though there was no writing.

"His (partner's) interest is rather in the nature of a *chose in action*, the transfer of which under our law is not required to be in writing."

THE facts appear from the judgment.

*Bawa, K. C.* (with him *A. St. V. Jayawardene*), for plaintiff, appellant.

*Hayley*, for defendant, respondent.

*Cur. adv. vult.*

[1] *(1916) 2 C. W. R. 81.*

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September 15, 1919. DE SAMPAYO J.—

The parties are Indian Muhammadans, who have resided and traded in Colombo. The plaintiff brought this action alleging that he and the defendant on August 5, 1909, agreed to carry on business in partnership in piece goods under the name and style of " Abdulla Hadjie Mohamed & Co., " each being entitled to eight shares out of a total of 16½ shares, and the remaining half share to go to the poor (that is to say, devoted to charity), and that since February 8, 1915, the defendant, who solely managed the said business, refused to acknowledge the plaintiff as his partner, and appropriated to himself the capital and stock in trade of the said business to the plaintiff's loss and damage of Rs. 70,000, and he prayed for a declaration of his rights as partner, for dissolution of the partnership and realization of assets, and for a partnership account. The defendant formally denied the alleged agreement, and stated that if there was such an agreement, the partnership was dissolved prior to the acts complained of against him. He further pleaded that if the plaintiff at any time had any interest maintainable at law in the said business, he made over the same to the defendant for good consideration.

The District Judge, in the first place, held that there was no writing as required by section 21, sub-section (4), of the Ordinance No. 7 of 1840, for establishing the partnership, and therefore the plaintiff's claim could not be maintained. In my opinion the document A dated April 29, 1909, is a sufficient writing for that purpose. It appears that the plaintiff was then trading in piece goods in premises No. 75A, Main street, Colombo, and his stock in trade was valued at Rs. 10,000, which was to be brought in as the capital of a new partnership composed of the plaintiff (Bhai Abdulla Hadjie Mohamed), the defendant (Hadjie Abdul Latiff Warind), and two other persons named Ibrahim Carim Gader and Abdulla Carim. Of these, Ibrahim Carim appears to have been then in India. The other three met, and the defendant and Abdulla Carim executed a document in Gujarati in the form of a letter addressed to the plaintiff. The document, which is attested by two witnesses, is as follows:—

To Bhai Abdulla Hadjie Mohamed Pardesi, inhabitant of Kutiyana, now of Colombo.

We, Hadjie Abdul Latiff Warind, Gader, Ibrahim Carim Gader, and Abdulla Carim Gader, inhabitants of Kutiyana, Hadjie Abdul Latiff Warind and Abdulla Carim of Colombo.

Bhai Ibrahim Carim is not here at present. If he comes within four or five months he will be entitled to a share.

We three have received the stock in trade of your shop No. 75A of Colombo at cost price, including outstanding of the firm, for which we have signed. The above-named shop will be carried on under the name of Abdulla Hadjie Mohamed & Co. If we start any business, it should be under the above-mentioned name, that is, Abdulla Hadjie Mohamed & Co. The capital is Rs. 10,000.

THE TERMS OF PARTNERSHIP.

Share of a quarter anna assigned for the great Pir Sahib. Share of eight annas is assigned for Abdulla Hadjie Mohamed, that means for yourself. Share of eight annas for three of us, that means Hadjie Abdul Latiff, Ibrahim Carim, and Abdulla Carim. Moreover, if Ibrahim Carim arrived here within the above-mentioned period, his share will be included with us, and if he does not come, his share will be divided between Hadjie Abdulla Latiff and Abdulla Carim.

The total shares arranged are sixteen and a quarter annas as above mentioned. The deed of partnership is to stand in force for five years. If any one out of three of us leave the firm by causing mischief, then he will have to leave after paying Rs. 1,000 damages, besides the amount received by him from time to time, and he will have to bear a share of any loss incurred, but if there is any profit, he is not entitled to it. If we wish to do any other business, it should be done with the consent of Abdulla Hadjie Mohamed and with the advice of each other. The supervision in the above business is given to Abdulla Hadjie Mohamed. We shall not do anything without your consent and permission. Further, we shall carry on the business heartily, and honestly keeping in mind the Holy Presence as a witness of our great Saint the Piram Pir. Further, each of us shall receive from Rs. 300 to 400 per year for food and clothing. No one will take more than that. The business shall be carried on even after the expiration of this deed if we agree, otherwise to settle the accounts. The Company shall bear our passage expenses from Colombo to Kutiyana, and the accounts will be closed yearly.

Besides the capital of Rs. 10,000, if any more money is required, the Company shall pay the interest, if any, on the additional sum.

We, each and all, the above-mentioned partners, are responsible for any transaction carried on from this day. You are entitled to recover a share of the losses from our private property.

We have signed this deed on our own account in full possession of our senses, with good heart, knowing, and understanding, and we are quite sober at the time of signing. Accepted by us and our heirs, the 29th April, 1909, Thursday, on the 7th day of Rabiul Akbar 1327. Waisak Sudth Thursday.

Written by Abdulla Carim Gader in our presence of all.

Signed by myself (on 50-cent stamp), Abdulla Carim. The above writing is correct.

*Witness:* Hadjie Abdul Gany Gija Pardesi, in the presence of three partners.

*Witness:* Yoosuff Sakur Jandula, in the presence of Hadjie Latiff, Abdulla Carim, and Abdulla Hadjie Mohamed.

Translation from Gujarati.

(*Signed*) M. ABDULLA,
Sworn Translator, Colombo.

The above document contains all the essential elements of a partnership agreement. The reason why the document has been considered as not a sufficient writing under the Ordinance is that it is not signed by the plaintiff. The provision of section 21 of the Ordinance is that " No promise, contract, bargain, or agreement, unless it is in writing and signed by the party making the same, or

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by some person thereto lawfully authorized by him or her, shall be of force or avail in law for any of the following purposes. "

The purposes mentioned are (1) for a guarantee, (2) for pledging movable property, (3) for the purchase or sale of movable property, and (4) for establishing a partnership where the capital exceeds one hundred pounds (*i.e.*, Rs. 1,000). It will be noticed that the writing is required to be signed by the party making the promise, contract, bargain, or agreement. The entire provision is intended to require a particular kind of evidence to prove a contract or agreement, which may in any action or legal proceeding be denied by the party making the same. This is undoubtedly so in the case of the purposes (1), (2), and (3), and there is no reason for thinking that both parties must sign in the case of (4), which is provided for in the same language and in the very same context as the other cases. There are, of course, always two parties to a contract, but the question in every case is whether the writing is signed by the party against whom the contract or agreement is sought to be enforced. For the purpose of this action, I think it is only necessary to remember that the agreement of partnership is sought to be enforced against the defendant who denies its existence, and he having signed the writing in question, I think the plaintiff is entitled to rely on it for establishing the partnership. The other two persons retired from the partnership on August 5, 1909, and gave over their shares to the defendant, and this explains the statement in the plaint that the plaintiff and the defendant agreed to carry on business in partnership on August 5, 1909, though the date of the writing was April 29, 1909.

Another point decided by the District Judge against the plaintiff is as to the continuance of the partnership after the expiration of the period of five years provided for in the agreement. Under the English Partnership Act, which generally applies to Ceylon by virtue of Ordinance No. 22 of 1866, where the partners carry on the business without a fresh agreement, a partnership at will will be presumed, but it has been held on Ceylon that by reason of the requirement as to writing in Ordinance No. 7 of 1840 that particular provision of the English Act does not apply in Ceylon, and that any agreement to continue the partnership must be evidenced by a writing in the same way as the original partnership agreement. *Raman Chetty v. Vyraven Chetty.*[1] This case, however, is, I think, distinguishable from the case cited, because in the original agreement of partnership there is this provision: " The business shall be carried on even after the expiration of this deed if we agree. " This appears to me to amount to an agreement that the partnership shall be continued if the members do not wind up the business at the expiration of the period of five years, and I think that no further writing is required if they continue to carry on the business, as they, in fact, did.

[1] *(1916) 2 C. W. R. 81.*

However this may be, the ultimate determination of this case depends on another question, namely, whether the plaintiff in February, 1916, assigned his share in the partnership to the defendant and ceased to be a partner and to have any interest in the business. The business does not seem to have prospered at any time, and about 1915 the plaintiff was in great financial straits. The business at that time was carried on in three shops, viz., the main shop at No. 75A, and two branches at Nos. 72 and 84, Main street, Colombo. The plaintiff's financial position at this time was so bad that he was actually obliged to seek the protection of the Court and was adjudicated an insolvent. In the insolvency case he disclosed the business and stock in trade of shops Nos. 72 and 84 only. The plaintiff pretends that only these two establishments suffered losses, and that No. 75A was making profits. But it is clear from the accounts and from the evidence of the plaintiff himself that the business of the partnership as a whole was in a bad way, and that there were large unliquidated liabilities. The circumstances make it highly probable that the plaintiff towards the latter end of 1915, as the defendant says, approached the defendant and proposed that the defendant should take over the plaintiff's share of the partnership and of his share of the debts and release the plaintiff from liability for the debts, and that this proposal was accepted and given effect to in February, 1916, when the defendant took a lease of the premises in his name and put up a new sign board. The plaintiff even admitted to his assignee in insolvency that he had made a transfer of his share to the defendant. The learned District Judge was satisfied on this point, and after considering the evidence, I have myself come to the same conclusion. It is, however, contended that the assignment was not effected legally, inasmuch as there was no deed of assignment or other sufficient writing for transferring the plaintiff's share of the partnership to the defendant, the argument being that the share was " goods, " and was governed by sub-section (3) of section 21 of Ordinance No. 7 of 1840, and now by the Sale of Goods Ordinance, No. 11 of 1896. I may say that even if these Ordinances applied the defendant, who was already in possession of the assets and stock in trade, must be taken when he agreed to the transaction, to have received " delivery " of the plaintiff's share, and, as he likewise took upon himself and liquidated the obligations of the partnership, he must also be taken to have paid the " price. " Section 1 of the latter Ordinance, after defining a contract of a sale of goods, provides that " there may be a contract of sale between one part owner and another. " Constructive delivery, such as takes place when the buyer was in possession of the goods before sale and holds them on his own account after the sale, is sufficient in the case of a sale by one part owner to another. *Story, section 312a.* The nature of a share in a partnership, however, shows that the argument cannot be

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sustained for another reason. Lindley on *Partnership, vol. 1, p. 377 (7th ed.)*, says, with reference to authorities, " what is meant by the share of a partner is his proportion of the partnership assets after they have been all realized and converted into money, and all the partnership debts and liabilities have been paid and discharged, " so that a partner is not the owner in the ordinary sense of a share in the individual assets and an assignment by him of his share is not governed by the formalities relevant to the transfer of goods. His interest is rather in the nature of a *chose in action*, the transfer of which under our law is not required to be in writing. In *Watson v. Spratley*[1] it was held that a share in a mining company was not an interest in land within section 4 of the Statute of Frauds, nor goods, wares, or merchandise within section 17 of the Statute. Moreover, the defendant having, in fact, entered into the transaction at the plaintiff's request and acted upon it to his prejudice, I do not think that the plaintiff is now entitled to go behind it and make his present claim on the footing of the old partnership.

In my opinion the dismissal of the action on the ground that the plaintiff's interest in the partnership was assigned to the defendant in February, 1916, and that he has now no claim to any accounting, is right, and I would dismiss the appeal, with costs.

SCHNEIDER J.—I agree.

*Appeal dismissed*