Privy Council Appeal No. 72 of 1913.

Arthur John Pate - - - - - *Appellant,*

v.

Charles Henry Pate, since deceased (now represented by Walter Charles Pate and others) - *Respondents.*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JULY 1915.

Present at the Hearing:

LORD SUMNER.
LORD WRENBURY.
SIR EDMUND BARTON.

[*Delivered by* LORD SUMNER.]

From the beginning of 1898 Arthur John Pate, now appellant, Charles Henry Pate, whose legal personal representatives are now respondents to this appeal, and George William White and Charles McClay, both now dead and strangers to these proceedings, traded together in a coaching business between Matale and Jaffna and between Damboola and Trincomalee. They had no articles of partnership. There was no agreement in writing, or written memorandum of the bargain subsisting between them. Their capital exceeded 100*l.* Disputes presently arose, and there has been much controversy about them. In one way or another

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their partnership—for such *de facto* it was—had come to an end before December 1903, when Charles Henry Pate began the present suit, making Arthur John Pate the principal defendant.

The plaint alleged that there was an agreement of partnership, carried out by contributions of capital and by joint trading, and alleged also its ultimate dissolution. It stated that no account had been taken or settled, and prayed a decree for partnership accounts, with payment of such sums as might be found due and other suitable relief.

The answer took the objection *in limine* that the partnership agreement was not proved by any writing in accordance with Ordinance No. 7 of 1840, section 21. The action went to trial. It was held to be maintainable, and the ruling was sustained on appeal. This was in July 1907. Enquiries were directed, and further proceedings and appeals took place till, in December 1911, the Supreme Court disposed of the last of them, and judgment went against the now appellant for some Rs. 40,000.

The respondents' counsel drew their Lordships' attention to the fact that the Supreme Court of Ceylon disposed of the objection based on Ordinance No. 7 of 1840 as long ago as 1907, while leave to appeal to their Lordships' Board was only granted in 1912. It was suggested that after such an interval of time their Lordships might well decline to entertain what was called a mere technical objection. The point had been argued when the Supreme Court granted leave to appeal, and the court, following prior decisions in Ceylon, held that the decree, which declared the existence of a partnership, was not appealable till the taking of accounts had shown whether or not an amount of

Rs. 5,000 or more was involved, as provided in Rule 1 (*a*) of the rules scheduled to Ordinance No. 31 of 1909. The appellant's case did not raise this point; and, as their Lordships are of opinion that it is not an objection of which their Lordships would take notice *motu proprio*, no further observation need be made upon it.

Ordinance No. 22 of 1866 enacted that English law is the law of partnership in Ceylon, but this in no way enlarged or diminished the prior Ordinance No. 7 of 1840. When that Ordinance has been construed, no court can proceed to modify its effect or restrict its application.

It is described as an Ordinance to provide more effectually for the prevention of frauds and perjuries. Its object is effected by requiring certain kinds of transactions to be proved by writing, not by limiting the competency of persons, or by prohibiting or penalising their acts, or by avoiding certain classes of transactions. After a code of formalities for the execution and attestation of wills and sundry deeds and other instruments in twenty sections, it proceeds in section 21 to what is plainly an evidentiary provision with regard to certain legal proceedings. It enacts that—

"no . . . agreement, unless it be in writing and "signed by the party making the same . . . shall be "of force or avail in law for any of the following "purposes."

The first three purposes are: (1) charging anyone with another's debt or default, (2) pledging movable property without delivery, and (3) sale of movables without either delivery or some payment. The fourth is—

"for establishing a partnership where the capital exceeds "one hundred pounds."

To this there is a proviso—

"Provided that this shall not be construed to prevent "third parties from suing partners, or persons acting as "such, and offering in evidence circumstances to prove a "partnership existing between such persons, or to exclude "parol testimony concerning transactions by or the set- "tlement of any account between partners."

But for the use of the word "establishing" as to the purpose, and of the word "prove" in the proviso, it could hardly be doubted that "establishing" means "establishing by proof" *coram judice.* The significance of a change of term as importing change of substance, though material, may easily be exaggerated. If at the end of the trial the Judge had said to the plaintiff, "you cannot succeed unless you "establish a partnership, and on the evidence "you have established none," the mere expression would have been perfectly correct. In their Lordships' opinion the words, "for establishing "a partnership," clearly apply to the present case, which was founded on the allegation of an agreement, not expressed in any writing, of which parol evidence was adduced for the purpose of establishing a partnership as the basis of the suit. This agreement, in their opinion, was of no force, and did not avail in law unless it could be brought within the proviso. They are unable to accept the somewhat unpractical contention that "establishing" here specially refers to cases (if such there be) where the plaintiff seeks to establish his disputed right to be a partner, and not to cases, where the parties have acted as if they were partners in fact and some dispute has arisen as to their partnership rights or property *inter se.*

It is true that the Ordinance says "no "agreement shall be of force," and not "no "evidence of an agreement shall be of force,"

but this appears to be a mere verbal distinction. In what sense could an agreement be of force for establishing a partnership, which would effectually distinguish the agreement from the record or evidence of that agreement? It is said that a partnership which exists in fact, and *à fortiori* a partnership which has existed in fact and has been determined, needs no "establishing," a term only appropriate to that which exists exclusively in promise and not in performance. Again, this is only a play upon words. Partnership is essentially a relation resting in agreement. That agreement may be proved or established (if there be no evidentiary law to the contrary) by proof of an express agreement, written or unwritten, or by proof of such acting as raises the inference of an implied agreement, but a partnership, whether in course of performance or wholly spent, is still a matter of agreement, though of agreement coupled with something more. If agreement once be negatived, there is no partnership at all. However the matter may stand where an existing or past partnership is admitted, it is equally necessary to "establish" the agreement upon issue joined in that regard, whether the partnership alleged to be agreed is, or was, or is to be. The requirement is evidently a binding rule of evidence in courts of law.

As all parties to the suit had been *de facto* partners, or were the legal personal representatives of such persons sued as such, only the last line of the proviso need be considered. The question is whether the present is a case of "parol testimony concerning "transactions by" partners, or concerning "the settlement of any account between "partners."

Their Lordships think that the answer must be in the negative. Where the transaction of which proof is tendered would be irrelevant if it were not that it is a transaction by a partner, proof of it is testimony for establishing a partnership, and if that be not established the proof of the transaction is immaterial. If parol testimony can always be given concerning transactions by partners, it is not easy to see what the cases are in which a writing signed by the party is requisite. Again, if the settlement of any account between partners means simply a claim upon an account stated, it does not matter whether the parties to it have been partners or have not. If there is to be any relevancy in the words "between partners," it must be because claims for a partnership account, where the partnership is neither admitted nor established, are not within the proviso. Thus, just as a third party seeking to make A and B liable to him as partners may give circumstantial proof of their partnership, so, as soon as a partnership agreement has been duly established by writing, parol testimony of the partners' transactions and settlements of account may be given without further documentary evidence.

It may be that such an interpretation will restrict the application of the proviso to cases which are limited in extent and of infrequent occurrence. Still, on the whole, if the law requires certain classes of agreement to be recorded in or evidenced by writing in order to prevent fraud and perjury, the smaller the area of an exceptive proviso, the more emphatic is the safeguard against the commission of these offences. It is plain that the words "for establishing a "partnership" refer to proof of a partnership generally, for otherwise the first branch of the

proviso would not be an exceptive proviso at all, but a mere unnecessary warning. The first branch of the proviso refers to the case of strangers to a partnership, who desire to prove its existence; the second deals with certain matters arising in proceedings between established partners.

It was urged upon their Lordships that, in accordance with a current of authority in Ceylon, now of considerable standing, a different interpretation should be placed on the words of this section. In 1871 it was decided in an anonymous case (D. C. Kandy, 52568, Vanderstraaten, p. 195) that when a partnership had been terminated, and on balance of account one partner claimed a sum to be due to him from another, he might prove his claim by parol evidence under this proviso, "as well "with regard to the fact that a partnership "had existed as with regard to the balance "due." The reason for this decision is not clear. The court distinguishes such a case from one in which a partnership has to be "established," by describing the latter as a case "where a man seeks to compel another "to act as his partner"—a description which is very obscure. This case has been followed in Ceylon ever since, often with expressed reluctance, and latterly always on the ground that the decision is binding. Thus, in *Sawenna Chetty* v. *Kawenna Chetty* in 1884 (6 Supreme Court Circular, p. 119), Burnside, C.J., expressed his doubts of it, and in *Bawa* v. *Mohamado Cassim* (1 Ceylon Law Reports, p. 53), Dias, J., supports the case on a supposed distinction between executory contracts of partnership and contracts which have been partly executed. Later decisions treat the point as ruled by the case in Vanderstraaten; *viz.*,

Mendis v. *Peiris* (1 Ceylon L. Rep., p. 98), though Burnside, C.J., dissented; *Silva* v. *Nelson* (1 Brown, 75) and *Annamali Chetty* v. *Shand* (1 Brown, 37); *G. R. de Silva* v. *A. B. de Silva* (6 New Ceylon Reports, 92; 3 Brown, 136); *Kanappa Chetty* v. *Wallathappa Chetty* (7 New Ceylon Reports, 339); *Singho Appu* v. *Amarasuriya* (1 Supreme Court Decisions, 37); and two later decisions, unreported, of which certified shorthand notes of the judgments were produced to their Lordships.

With all respect to the learned judges who so read the Ordinance in 1871 their Lordships not only think that their decision was erroneous, but also that even after the interval of forty-four years it ought to be overruled. The present is not one of those cases in which inveterate error is left undisturbed because titles and transactions have been founded on it which it would be unjust to disturb. There can be few partnerships in Ceylon, still in operation or unliquidated, in which writing has been dispensed with on the faith of these decisions. If parties choose to disregard so ordinary and so simple a formality as the Ordinance requires, there is no hardship in leaving them to take the consequences, nor is it in any case sound to misconstrue a Statute for fear that in particular instances some hardship may result. That is a matter for the Legislature, not for the courts. Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good, and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription, the policy of which was the prevention of fraud. This the Legis-

lature must be taken to have weighed before enacting the Ordinance. All that remains for judicial determination is its true meaning.

This decision has made it unnecessary to pursue the issues of fact, which were investigated by the courts below. Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment should be entered for the defendants in the action.

In the Privy Council.

ARTHUR JOHN PATE

v.

CHARLES HENRY PATE, SINCE DECEASED (NOW REPRESENTED BY WALTER CHARLES PATE AND OTHERS).

DELIVERED BY LORD SUMNER.

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