1937

Present : **Hearne J. and Fernando A.J.**

WICKRAMASURIYA *et al.* *v.* DE SILVA *et al.*

16—D. C. Colombo, 5,165.

Partnership—Agreement for an indefinite period—Terminable at will—Notice of termination—Service of summons in partnership action.

Where, according to the terms of a partnership deed, the partnership was to continue after the death of a partner as a partnership among the heirs of the deceased partner and the surviving partners,—

Held, that the partnership created by the deed was one for an indefinite period and was therefore terminable at will.

A partnership at will may be terminated by notice.

Service of summons in an action for dissolution of the partnership amounts to such notice.

APPEAL from a judgment of the District Judge of Colombo.

N. E. Weerasooria (with him *Gratiaen* and *J. A. T. Perera*), for first defendant, appellant.

H. V. Perera, K.C. (with him *D. W. Fernando*), for plaintiffs, respondents.

N. K. Choksy, for second to sixth defendants, appellants.

Cur. adv. vult.

July 30, 1937. FERNANDO A.J.—

The plaintiffs brought this action for a dissolution of the partnership existing between them and the first defendant, and constituted by the agreement P 6 dated July 2, 1933, and they complained that the first defendant had done certain acts which made it impossible for the plaintiffs to continue the partnership business with the first defendant, and that such conduct was in terms of section 35 D of the Partnership Act of 1890 calculated to affect the carrying on of the business, and that circumstances had arisen which rendered it just and equitable that the partnership should be dissolved. They alleged that due notice had been given to the first defendant of the fact that the said business should be dissolved. They prayed that pending the dissolution the plaintiffs be authorized to carry on the business or in the alternative that the first plaintiff be appointed receiver for the beneficial winding up of the business. The first defendant filed answer alleging that on account of certain acts done by the first plaintiff, the first plaintiff was not entitled to an order for the dissolution of the partnership, and he prayed that plaintiff's action be dismissed, for an injunction restraining the first plaintiff from carrying on the business, and that the first plaintiff be ordered to render an account to the first defendant.

When the case came on for trial, a number of issues was framed, and the learned District Judge after framing the issues, and after some discussion on certain of these issues, decided to try the issues set out by him at page 49 of the type written copy of the record. He held that the partnership subsisting at the time of the action was the partnership

created by deed P 6. On issues 2 and 3 he held that the partnership was duly registered, and that the plaintiffs could maintain the action. On issues 5, 6, and 7 he held that the deed P 6 created a valid *fidei commissum* under which a seven-ninths share of the business passed to the donees, subject to the life-interest of the first plaintiff, and subject to certain other conditions recited in that deed. He also held on issue 15 F that the partnership created by deed P 6 was a partnership for an undefined period, and therefore, a partnership at will. He then held on issues 15 B and 15 C, that the plaintiffs were entitled to a dissolution of the partnership as from the date of the service of the summons in this action on the first defendant, that is to say, as from June 10, 1936, and accordingly entered judgment for the plaintiffs declaring that the partnership shall be deemed to have been dissolved as from June 10, 1936, ordering an account to be taken on that footing, and also a sale of the assets of the partnership. He also appointed the first plaintiff receiver for the purpose of winding up of the business.

The first defendant appeals against this order, and Counsel for the appellant argued that the partnership created by P 6 was not a partnership at will. His case was that the terms of P 6 clearly showed that the partnership was to exist during the life of the first plaintiff, and was to continue even after the death of the first plaintiff as a partnership between the first defendant and the 2nd to 4th plaintiffs, and 2nd to 5th defendants. On this footing, he argued that the partnership must be regarded as one created for the lifetime of the first plaintiff, and that as such it was a partnership for a definite period. It is admitted that the law that applies is the English law, that is to say, the Partnership Act of 1890 (53 & 54 Victoria C. 39), and section 26 (1) of that Act provides that "where no fixed term has been agreed upon for the duration of the partnership, any party may determine the partnership at any time on giving notice of his intention so to do to all the other partners, and Lindley in his *Treatise on the Law of Partnership (9th ed.), at p. 174*, states the effect of this sub-section in these words: "in other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved". Section 32 of the Act further provides that subject to any agreement between the parties, a partnership is dissolved if entered into for an undefined time by any partner giving notice to the other or others of his intention to dissolve the partnership". It also provides that in the case of notice as above, the partnership is dissolved from the date mentioned in the notice, or if no date is so mentioned, as from the date of the communication of the notice. It seems to me that the case of *Crawshay v. Maule*[1], is clear authority for the proposition that the partnership created by the deed P 6 was a partnership for an indefinite period, and therefore, terminable at will. "The general doctrine", said Lord Eldon in that case, "with respect to a trading partnership is that where there is no agreement for its continuance, any one of the partners may terminate it, and admitting the serious inconveniences which sometimes ensue, it becomes us to recollect the formidable evils which would attend the opposite doctrine; nor is it clear that a better rule could be suggested".

[1] *Swanston 495.*

Counsel next argued that even if this partnership could be terminated at will, the District Judge was wrong in holding that the contract had terminated on the date of the service of summons. His contention was that a party could either ask for a dissolution by Court or terminate the contract by notice. If he came to Court asking the Court to dissolve the partnership on grounds of misconduct, &c., it was not open to him to ask the Court to declare that the partnership had been terminated by the service of the summons in the action. He contended that a party's rights must be determined by the Court according to the pleadings filed by him, and that a party could not be allowed to add a fresh cause of action to the cause of action already pleaded by him in his plaint. The first plaintiff had prayed for a dissolution on the ground of misconduct, and he could not be allowed to amend that plaint in order to allege that the partnership had terminated by notice. Here again, I think the case is covered by authority. It was held in *Syers v. Syers*[1] that the answer filed by a defendant who submitted that there was no partnership, and that if there was a partnership, it was a partnership at will, and had been determined by a letter previously written by him, had the effect of putting and end to the partnership. "If the partnership", said Lord Cairns, "was not terminated by that letter, there is in this answer the clearest intimation that the will of the partners is against any continuance of the partnership; and whether that will is expressed by a letter or by an answer or in any other way is immaterial. There is no technicality, no magic as to the mode of expression. There is here the clearest intimation given by the answer that if there is a partnership, the defendant wishes it no longer to continue".

The principle is clear. A partnership terminable by will can be terminated by notice, and notice may be given in one of several ways. The filing of a pleading in Court stating that the partnership has been dissolved or praying that it should be dissolved is an indication of the intention of the person who files that pleading to terminate the partnership, and even if his plea that it has terminated previously fails, that pleading itself will be regarded as a notice coming into effect on that date. There were earlier decisions in which it had been held that a writ taken out by the plaintiff was a sufficient notice of termination, and in *Syers v. Syers* (*supra*) the answer was given the same effect.

I would hold therefore that the learned District Judge was right in coming to the conclusion that this partnership had been terminated by the service of summons in this action on the first defendant. That was a clear intimation to the first defendant that the first plaintiff wished to terminate the partnership. In the circumstances it was unnecessary for the Court to proceed any further or to inquire into the ground on which the first plaintiff had asked for a dissolution.

It was urged for the appellant that the learned District Judge should not have appointed the first plaintiff, receiver for the purpose of winding up the business, and that the first defendant had no opportunity of showing cause against that appointment. As a matter of fact, in the plaint, the plaintiffs asked that the first plaintiff be appointed receiver to wind up the business, and the first defendant in his answer prayed that

[1] *(1876) 1 A. C. 174.*

the first plaintiff be restrained by injunction from carrying on the business. It was necessary, therefore, to make some order with regard to the business pending the action, and on June 29, 1936, the parties agreed that the first plaintiff be appointed receiver and manager of the business pending the action on certain conditions set out in the order made on that date. The learned District Judge does not expressly state why he appointed the first plaintiff as receiver for the purpose of winding up the business, but the question whether the first plaintiff should continue in the office of receiver pending the action came up before the same learned Judge on November 13, and he was then of opinion that the business could not be carried on with advantage both to the first plaintiff and to the first defendant by a person other than the first plaintiff. Perhaps in these circumstances, he did not think any further inquiry necessary. At the same time the first defendant had no opportunity of showing cause against the appointment, and there is no reason why he should not have been allowed to urge any objections he wished to offer. I do not think it necessary, however, for this reason to interfere with the order made by the learned Judge inasmuch as the first defendant can still be given an opportunity to show cause against that order, in other words, the desired object may be obtained by allowing the first defendant to apply to the District Judge for an order removing the first plaintiff from the office of receiver to which he has been appointed. I would, therefore, direct that the first defendant be allowed within three weeks of the receipt of this record in the District Court to file an application for the removal from office of the first plaintiff setting out the reasons if any, on which he bases his application. That application if filed, may be dealt with by the Court under section 674 of the Civil Procedure Code.

Subject to the above directions, the appeal is dismissed, and the appellant will pay to the respondents their costs of this appeal.

HEARNE J.—I agree.

Appeal dismissed.

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