Present : Wood Renton C.J. and De Sampayo J.

1916.

SINNO *v* PUNCHIHAMY.

41—D. C. Kandy, 23,066.

Partnership—Agreement not in writing—Capital exceeding one hundred pounds—What is meant by " capital " ?

DE SAMPAYO J. (*obiter*).—The term " Capital " in Section 21 of Ordinance No. 7 of 1840 refers to the initial Capital of a partnership, and does not extend to the amount that may stand as capital, after additions and withdrawals, at any time during the course of the business.

THE facts are set out in the judgment of De Sampayo J.

Bartholomeusz, for plaintiffs, appellants.

A. St. V. Jayewardene, for defendant, respondent.

Cur. adv. vult.

1916. March 10, 1916. DE SAMPAYO J.—

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The plaintiffs in their plaint alleged that in April, 1913, they and the defendant agreed to carry on business in partnership as printers and publishers, and they brought this action for the dissolution of the partnership and for an accounting. There was no agreement in writing as required by section 21 (4) of the Ordinance No. 7 of 1840, but the plaintiffs alleged that the capital of the partnership was under Rs. 1,000. The defendant in his answer denied the alleged partnership, and stated that he was in May, 1913, induced by the plaintiffs to buy a printing press and other accessories, and to carry on a business in printing and publishing, and that the plaintiffs were only his servants, having been employed by him as foreman and manager respectively. Certain issues arising upon the pleadings were submitted to Court, but when the case came on for trial, the defendant withdrew his denial of the partnership and consented to the matter of accounts being referred to commissioners to be appointed by the Court. The commissioners so appointed examined the parties, took an account, and reported to Court the result of their proceedings. Among other things they reported that the defendant's books " showed items amounting to a total of Rs. 1,417.28 as representing the value of the press and press accessories," and, setting off expenditure and debts against the assets and income, they found that there was a nett balance of Rs. 398.82 due to plaintiffs.

When the case came up again before the District Judge the following issue, suggested by the defendant's proctor, was accepted as an additional issue:—

> " Whether, in view of the finding and report of the commissioners that the property of the alleged partnership is over Rs. 1,000 in value, it is competent for the plaintiffs to maintain this action."

On behalf of the plaintiffs the report and proceedings of the commissioners were put in evidence. The defendant called one of the commissioners, and produced the defendant's " expenditure book, " marked A, in which eight items relating to the purchase of two presses and materials appeared as of date May 15, 1913, amounting to Rs. 1,197. These items were followed by other items in June (without a date), making a total expenditure of Rs. 1,308.88. The District Judge, taking May 15, 1913, as the day on which the presses and materials were bought and on which the business started, said that " if Rs. 1,197 was the amount the parties had to spend on the very first day, it was not unreasonable to suppose that they had a balance of capital for the purchase of other accessories and for the conduct of the business," and held that the business began with a capital exceeding Rs. 1,000. The plaintiffs' action was accordingly dismissed.

The District Judge's idea that the business started on May 15, 1913, is not in accordance with the case of either party. The plaintiffs say that the business was started in April, with the first press and accessories called the " Modern Press," which they bought with money contributed by all the parties for the purpose of the business. This is borne out by the deed of transfer dated April 24, 1913, in favour of the partners, from the former owner of the press and accessories. The defendant stated before the commissioners that the business started in June, intending no doubt thereby to show that the press subsequently bought was part of the capital of the concern. The defendant has nothing to go upon for fixing a date, and so far as the books are concerned, the commissioners report that the defendant's books contain many erasures and alterations, and they significantly remark " that the dates are often topsy-turvy," that the expenditure book A, upon which the District Judge relies, is demonstrably false as to the date. It has the heading " Spent for the Chandralankara Press on May 15, 1913." The defendant at first tried to make out that this was in the handwriting of the second plaintiff. But the commissioner who was examined in Court says that it was ultimately admitted to be in the handwriting of the defendant himself, and there is more than a suspicion that it was put in by him to serve the purposes of this case. The first item under the heading is " Modern Press Rs. 325," and I have already shown by reference to deed No. 3,917 that that sum was spent, not on May 15, 1913, but on April 24, 1913. Another item under the heading is " Half-demy foolscap Victoria machine, Rs. 440." If that item is taken out, even assuming that all the rest of the items in book A constitute the capital of the partnership, the amount is less than Rs. 1,000. Now, as to the " Victoria machine," the plaintiffs say that it was not bought by the partners with their money, and they do not claim it. The defendant's own evidence on the point is that he bought it for the partners, for Rs. 440, out of his own money. He carefully abstains from saying that it was bought on May 15, 1913, or that it was ntended to be part of the capital of the partnership; nor do the circumstances justify any such conclusion. It may indeed be part of the assets of the partnership, and the defendant may be entitled to its price as a debt due to him from the parnership, but I think it cannot be included in the capital of the partnership. Accordngly I think that the capital was under Rs. 1,000.

Having now dealt with the facts, I may point out that there is a misconception as to what is capital, on the face of the issue which I have above quoted, and which has been tried by the District Judge. The distinction between the capital and the property of a partnership does not appear to have been sufficiently realized. " By the capital of a partnership," says *Lindley (7th edition) 358*. " is meant the aggregate of the sums contributed by its mebers for

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the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business. The capital of a partnership is not therefore the same as its property." *Lindley, at p. 359*, adds: "It follows from these considerations that the agreed capital of a partnership cannot be either added to or withdrawn except with the consent of all the members of the partnership." The principle is undoubted, and no further references are necessary. *De Silva v. De Silva*,[1] cited on behalf of the defendant, is no authority to the contrary, inasmuch as that case was decided clearly on the assumption that the capital of the partnership was over Rs. 1,000. The question, however, occurs to me as to whether, when section 21 (4) of our Ordinance speaks of "capital," it refers to the initial capital, or whether it extends to the amount that may stand as capital, after additions or withdrawals, at any time during the course of the business. The latter construction appears to me to render the provision of the Ordinance unworkable, and I think that the Ordinance refers to the initial capital only, and not to the fluctuatng caiptal of a partnership. But it is unnecessary to decide the point, because, as I have said, the "Victoria machine" purchased for Rs. 440 is not shown to have been brought in as part of the capital. The plaintiffs did not contribute to its purchase, and certainly did not consent to its being added to the capital. The only reasonable conclusion to be drawn from the whole tenor of the defendant's evidence is that the money that went towards its purchase was money advanced by him to the partnership. Moreover, the defendant having admitted the partnership, the Court will exact from him the most strict proof of any facts on which he may rely as entitling him to take refuge under the Ordinance. In my opinion the defendant wholly failed to discharge the heavy burden which lay on him.

I would set aside the decree appealed from and send the case back, in order that the claim of the plaintiffs may be determined on the footing that no writing was required for establishing the partnership between the parties. The plaintiffs will have the costs of the trial in the District Court and of this appeal. All other costs will be in the discretion of the District Judge.

WOOD RENTON C.J.—I agree.

Set aside.

[1] *(1902) 3 Br. 136.*