Privy Council Appeal No. 133 *of* 1915.

Balagey Prolis de Silva - - - - - *Appellant,*

v.

Medigaspege Don Carolis de Silva - - - *Respondent,*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT OF SINGAPORE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD SHAW.

[*Delivered by* THE LORD CHANCELLOR.]

In this case their Lordships agree with the main reasoning in the judgment of the Acting Chief Justice, but they think that the formal order made by the Supreme Court needs modification in the manner and to the extent which they will indicate.

The dispute which has given rise to this appeal has occurred in an ordinary action for account by one surviving partner, who is the present appellant, against the legal personal representative of his deceased partner, the respondent in this appeal.

The partnership in question was originally constituted between the appellant and one Medigaspege Arnolis de Silva in the month of July 1903, and was carried on until the death of M. A. de Silva on the 10th June, 1908. The business was that of contractors, and in the course of carrying it on a series of six important contracts were undertaken, five for the Municipal Commissioners at Singapore, and one for a company known as the Straits Trading Company. In respect of all these contracts accounts were kept by and under the direction of the deceased partner. These accounts were open and unsettled between the parties on his death. The action, which sought the ordinary relief for partnership accounts, was instituted on the 5th January, 1909, and on the 11th June of that year the Court made the usual order for the accounts of partnership dealings and transactions in respect of four of the said six contracts. No question

arose in the course of taking those accounts with regard to one of the four, but of the remaining three contracts, each of which was made with the Municipal Commissioners, and which were treated in the evidence as one contract, called the Grove Road contract, the point arose which has given rise to this appeal.

Having regard to the manner in which the business of the partnership was distributed between the partners, the deceased partner was in reality the accounting member of the firm in respect of these contracts, and on his behalf certain evidence was tendered before the Registrar in the course of taking the accounts, to which the appellant entertained and has throughout persisted in urging objection. This evidence consisted of certain note-books, beginning at the end of 1906 and running down to the date of the deceased partner's death. These note-books were alleged, on behalf of the deceased partner, to be books that were kept for the contracts, but it is admitted that they contain other entries besides entries relating to partnership matters, although it is said that these entries were few and were made by mistake. Proper books of the partnership had been kept until 1906, and their Lordships are not satisfied that such books were not also in existence for the period in dispute. The witness who was called on behalf of the defendant, and who was his attorney, prepared the whole of the accounts, and was with the deceased for eighteen months before the date of his death. He was not able to assert that proper books were not also kept relating to this contract.

Now the books in question showed a number of receipts by the deceased partner of moneys due to the partnership, and in whatever light these books are regarded, these entries, being against the interest of the deceased man, would be properly admissible in evidence against him. But they also contained a series of entries which it was alleged were entries of payments made by the deceased for the partnership account. Such entries are independent of the entries of receipt, and they do not appear to have contained any statement that connected them directly with the entries of receipt. The defendant has been charged with the moneys so shown to have been received, and the real question raised on this appeal is whether he is at liberty to rely upon the entries of the payments made for the purpose of discharging himself *pro tanto* of the obligation thus cast on him.

The Registrar originally declined to look at the books for this purpose, but, on appeal to the Chief Justice, he made an order on the 27th May, 1913, declaring that the books were *primâ facie* evidence of the truth of their contents in support of the accounts, but without prejudice to the question as to whether the entries alone were sufficient to prove the payments and charge the partnership. The matter was then remitted to the Registrar, who by his certificate of the 11th November, 1913, stated that he was not satisfied that the payment in the said books related to the contracts, and he therefore held that

they did not prove the payments, which he accordingly disallowed. A summons was then taken out to vary this certificate on behalf of the defendant, and this summons was dismissed by the Chief Justice on the 2nd June, 1914. From his judgment an appeal was made to the Supreme Court, and they, on the 27th June, 1914, gave judgment, setting aside the Registrar's certificate so far as it related to the disallowance of these items of payment, and remitted the matter to the Registrar to take such corroborative evidence of the alleged payment as the appellant might adduce. It is from this judgment that the present appeal has been brought.

Now the effect of the judgment as it stands is to restore the books in question as affording some evidence of the payments to which the entries relate, and it would be difficult to understand how, if no other evidence were advanced, it would be possible for the plaintiff to displace the case thus made. In a case of this kind two questions must carefully be kept in mind. The one is the proper admissibility in evidence of the particular document which is challenged, and the other the weight to be given to the evidence that it furnishes, should it once be admitted as testimony.

In the view their Lordships take, the entries in these books do not in the circumstances afford any evidence in support of the challenged items. In the first place it is plain that these books are not the ordinary partnership books. They appear to have been nothing but memoranda from which the books could properly be made up, nor is it certain that books were not made up from these entries. Their Lordships are, therefore, unable to hold them as admissible under the rule which always permits the use of partnership books under the partnership control which each partner has the opportunity of inspecting and checking, as *primâ facie* evidence against each partner of the items which they contain relating to partnership matters. Nor, again, are the items of payment and receipt so connected together that admission of the one statement would necessarily involve the admission of the other. Their Lordships cannot consider them as standing in a different position from that which they would have occupied had they been kept on separate sheets of paper, and in that case no real question could have arisen as to their admissibility. This view is the same as that taken by Kindersley, V.C., in the case of *Reeve* v. *Whitmore*, 2 D. & S., 446, and that judgment, which has not, to their Lordships' knowledge, been questioned in any subsequent case, contains in their Lordships' opinion a correct expression of the law. Their Lordships are, however, much impressed with the fact that if these items be disallowed there is nothing to show that any payments were made at all, and it seems obvious that in contracts of the description under consideration some disbursements must have been made by the deceased partner, for which he would properly be entitled to credit; and they agree with the view of the Acting Chief Justice upon this point.

Fortunately it ought not to be difficult to obtain independent evidence of such payments. The contracts were comparatively recent, and the attorney of the defendant, who seemed to have some knowledge of the deceased partner's affairs, ought to be able, without great difficulty, to furnish such independent proof. It would certainly be remarkable if no receipts, accounts, or invoices could now be found which would enable the defendant to put himself in contact with the people by whom such evidence could be furnished. Their Lordships are clearly of opinion that, in the circumstances of this case, opportunity should be offered to the defendant to make good his position in this respect. They are unable to accept the view of Mr. Justice Sercombe Smith, that the Court ought not to remedy errors in matters of procedure or enable the respondent, in the circumstances of this case, to adduce fresh evidence, which had not been used on the hearing before the Registrar. In their Lordships' view, details of procedure should never be allowed to stand in the way of doing what appears to be fair between litigant parties. The only justification for such rules is that, on the whole, they assist and do not embarrass the Court in the administration of justice. On the other hand, they would agree that if in ordinary circumstances full and proper opportunity had been given for evidence to be furnished, and such opportunity had not been used, it would not be fair to the other litigant party to allow litigation to be unduly prolonged by further attempts to furnish evidence which in the first place had failed.

In the present case, however, they think that the defendant may not unreasonably have been misled by the judgment of the Chief Justice into thinking that the entries in the books did afford some evidence of the disputed items, and if that were so he would have been entitled to rely on this position and assert that, in the absence of conflicting testimony, these entries were sufficient for the purpose. In all the circumstances, therefore, their Lordships think that the right order would be to declare that the note-books cannot be used as proof of payments made on account of the partnership, unless in any instance such item of payment is on the face of the book connected with an item of receipt in the manner pointed out in *Reeve* v. *Whitmore*, but that with this direction the matter should be remitted to the Registrar to enable the respondent to furnish independent evidence of any payments that were made. The time to be allowed for procuring this evidence would of course be under the control of the Registrar, who would exercise his discretion in this matter, having regard both to the importance of avoiding unnecessary delay and at the same time giving full and sufficient opportunity for the evidence to be procured.

Their Lordships do not think fit to make any alteration in the order of the Supreme Court as to the costs, and there will be no costs of this appeal. They will humbly advise His Majesty accordingly.

In the Privy Council.

BALAGEY PROLIS DE SILVA

v.

MEDIGASPEGE DON CAROLIS DE SILVA.

DELIVERED BY

THE LORD CHANCELLOR.

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