Privy Council Appeal No. 100 *of* 1914.

Said and Company, having for its Manager Hajee Mamode Hossen - - - - - - *Appellants,*

v.

Mamode Hadee - - - - - - - *Respondent,*

FROM

THE SUPREME COURT OF SEYCHELLES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH FEBRUARY, 1916.

Present at the Hearing:

EARL LOREBURN.
LORD ATKINSON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment of the Supreme Court of Seychelles delivered on the 8th October, 1914, in favour of the respondent, on a defence *in limine litis* filed by him in an action brought by the appellants to recover the sum of 27,529·01 rupees, the—

"balance of an account for money advanced and goods supplied to the "defendant by the plaintiff from December, 1902, to the 30th November, "1911, with interest and costs."

The plaint, with summons, though entitled "Said and Co., plaintiffs, against Mamode Hadee, defendant," opens with the statement—

"The firm Said and Co. having for its manager Hajee Mamode "Hossen, of Victoria, Mahé, the plaintiff in this suit, claims," &c., &c.

It would appear on the face of the documents that this manager, Hossen, is not made a plaintiff in the action, and no satisfactory reason was assigned in argument for the appearance of his name in the pleadings. No particulars are given as to the date or dates at which the money alleged to be advanced was in fact advanced, or the goods alleged to have been supplied were in fact supplied. On the face of the plaint, it must therefore be taken that this firm of Said and Co.,

touching whose nature, origin, or mode of creation nothing whatever is stated, claim the right in the character of a firm as described to recover the entire balance alleged to be due upon transactions covering this extended period of nine years. The defendant on the 8th September, 1914, filed a defence traversing all the material averments in the plaint, and pleading that he never borrowed any money from the firm of Said and Co., and never was indebted to them in any sum for goods supplied. On the 17th September, 1914, the defendant filed an amended defence, which could scarcely be more ambiguous and embarrassing than it is if it had been designed to make it so. It runs thus :—

" The defendant for his defence *in limine litis* pleads that Hajee " Mamode Hossen has no right title or capacity to represent the firm " Said and Co., as the commercial firm Said and Co. has come to an end " since 1908."

That defence seems to treat Hossen as the proper person to have sued for the recovery of this money demand if the legal existence of his principal, Said and Co., had not terminated. But there is no allegation in the plaint that Hossen sues either in his own right or on behalf of any principal. The amended defence is not in the nature of a demurrer to the plaint, though it is admitted that the matters alleged in the latter are to be taken as true, but the issue raised by it as to the termination of the existence of Said and Co. was tried before the Chief Justice on the 1st October, 1914, Hossen being the only witness examined. He produced two deeds marked respectively " A " and " B," which were given in evidence. From that marked " B," dated the 5th February, 1900, and duly registered at Mauritius upon the same day ; it appeared that a " société en nom collectif " to carry on general commerce in the Seychelles Islands was thereby formed between four persons therein named, namely, Mamode Maidee or Meddy, Hajee Mamode Hossen, Hajee Mahomed Carrim Abdool Rassoul, and Mr. Said, for a period of five years from the 1st February, 1900, in the name of Said and Co.

The second article contained in the deed ran thus :—

" Cette société est contractée pour une durée de cinq années à " compter du premier février courant. Elle existera sous la raison sociale " Said et Cie."

By the 7th Article the direction of all the " affaires sociales " was vested in Mr. Said. He was made the administrator and general manager of the firm, and for that purpose was empowered to sign the firm's name ; and it was further provided that, in case of the decease of one of the partners, and also in case " du décès des dames Meddy et Hossen," the partnership should continue to exist between the surviving members and the heirs of the deceased member, who should be represented by one person. The deed marked " A " bore date the 28th August, 1905, and was duly registered at Mauritius on the same day. It contains recitals that the duration of the

"société" established by the deed of the 5th February, 1900, "sous la raison sociale Said et Cie.," had been fixed at five years from the 1st February, 1900; that it had therefore "pris fin" (terminated) on the 31st January, 1905; that it had not been put into liquidation, all "les intéressés" having decided to continue it, desiring to regularise their situation by fixing "le terme de durée de cette prolongation de société" and making certain modifications therein. The deed further provides that the "société" is renewed for a new period of three years from the 1st February, 1905, so that there may not be any interruption in the operations of the firm, and that Mr. Said is to continue to be administrator and manager of the firm's affairs. It provides for continuance of the firm in case of the decease of one of the partners and of Mesdames Maidee and Hossen, as in the earlier deed, and further provides that in case of the decease, absence, grave illness, or other "empêchement" of Mr. Said, the direction and administration of the firm should devolve upon Mr. Hossen, if he should be in Seychelles. Mr. Hossen, when examined, deposed that Mamode Maidee died in 1909 or 1910 leaving one child; that Mr. Said, who died in 1906, had given his share in the partnership to the witness's wife (Madame Hossen), who died in 1907; that he became manager of the company under the provisions of the aforesaid deeds on the death of Mr. Said, and had since continued in that position; that the company was not in liquidation, but that its business was being carried on as usual; that the defendant was in the office of Said and Co. when the partnership came to an end, continued to be employed therein as cashier up to March 1911, and kept a book (produced) in which he made entries, and had charge of the keys.

The question raised by this plea *in limine litis* is governed by certain provisions of the Civil Code and the Code de Commerce in force in the Seychelles, taken in connection with the principles laid down in certain cases and by certain text-writers to which their Lordships have been referred. By Article 1834 of the former code, as translated in the respondent's case, it is enacted—

"that every partnership must be made in writing if it is for an object of "which the value is over 150 fr.;"

and further that—

"no oral evidence shall be admitted against or beyond the contents of the "articles of co-partnership, nor as to what might be alleged to have been "said previously to the same or at the time thereof or since then even in "the case of a sum or value less than 150 fr."

The opening words of the article in the original are: "Toutes sociétés doivent être rédigées par écrit." The primary meaning in English of the French verb "rédiger" is "to draw out" or "draw up," "to write out," "to make out."

It appears to their Lordships to be perfectly clear that according to the provisions of this article a "société" such as

is mentioned in it can only be created, or called into existence by a written document, and that writing is not, as was contended, merely evidence of a parol contract, which though not enforceable unless thus proved, is yet, like a parol contract for the sale of lands, not void under the Statute of Frauds. By Article 1865 of the same code it is enacted (according to the same translation)—

" A partnership expires [' La société finit '] (1) by the expiration of the " time for which it has been formed; . . . . or (3) by the natural death " of one of the partners; . . . . (5) by the wish expressed by one or " several of the partners, not to remain partners."

And article 1866 enacts that—

" an extension of a partnership made for a fixed period can only be proved " (' prouvée ') by a writing made in the same form as the contract of " co-partnership."

The function of the writing mentioned in this article is probative; the function of that mentioned in Article 1834 is creative. No deed or writing other than these two was ever executed or entered into touching this partnership. It appears clear, therefore, to their Lordships that the legal entitity created by the deed of the 5th February, 1900, and thereby styled Said and Co., ceased to exist for all purposes other than liquidation on the 31st January, 1908, and that it was not, and could not, be re-created or its existence prolonged, simply by three of the surviving partners, though styled Said and Co., continuing to carry on its business up to the date of Maidee's death in 1909, or by two of them, namely, Hossen and Rassoul, continuing to do so afterwards up to March, 1911 (see "*Traité de Droit Commercial*," *par Lyon-Caen et Renault*, vol. 2, p. 240 (363), 244 (367)). If a liquidator be appointed, it is well established that the partnership is by operation of law treated as prolonged for the purpose of enabling him by suing in his own name, if need be, to recover and administer assets of the partnership, but for that purpose solely (see *Dalloz* (1863) 460). It appeared to their Lordships that Mr. Disturnal did not in his reply seriously dispute that the original partnership ended in January, 1908. What he contended for, as they understood him, was that a new partnership bearing the same name was created between the three surviving partners at that date; and, as a partnership expires by the death of one of the partners, presumably that a third partnership bearing the same name was created between Hossen and Rassoul on the death of Maidee in 1909. But even if this were so, neither of these two new partnerships would be a "société en nom collectif." At best each would only be an "association commerciale en participation" within the meaning of Article 47 of the Code de Commerce, styling itself, no doubt, Said and Co., but not having vested in it the assets of the original "société" of that name, nor entitled to recover the debts due to the latter. No evidence was given to show in whom the interest, in the original partnership, of Said deceased,

subsequently assigned to Madame Hossen, is now vested. Neither is it shown who is entitled to the interest of Mamode Maidee in the original "société." It is plain that the mere use of the name "Said and Co." would not of itself, apart from all questions of estoppel, entitle either of the new partnerships to recover a debt due to the original partnership. Again, a "société en participation" is not a "personne morale," a legal entity, however much the participants may desire to make it so. "Personnes morales" can only be created by the authority of the legislature, and under the conditions prescribed by the legislature, from which it follows that "sociétés en participation" are not considered as having an individuality distinct from that of the members composing them, with the result that the manager of such a partnership cannot represent it in any litigation, since that would violate the rule "nul ne plaide en France par procureur," and the members must consequently sue and be sued in their own names. ("*Traité de Droit Commercial*," *par Lyon-Caen et Renault*, Articles 90 (*e*), 105, 106, 1057, 1058.)

The other authorities, with the exception of the two cases hereafter referred to, support these several propositions. Article 42 of the Code de Commerce, in their Lordships' view, refers to the formalities to be observed in the registration and posting of extracts from the written documents creating "sociétés en nom collectif et en commandite." All these formalities were duly observed in the reference to the original partnership. The article cannot have any application to "sociétés" or "associations en participation," if such they were, created after the 1st February, 1908, because they were not created by any written instrument.

Counsel for the appellant contended, however, that though the condition of things may be in law and fact such as above described, the respondent is estopped from asserting that the legal entity created in February, 1900, ceased to exist on 31st January, 1908, or at any time before March, 1911, and this, though they have failed to produce any authority to show that if the respondent paid to the plaintiff the debt sued for, and a liquidator of the original partnership were subsequently appointed, that liquidator could not recover over again from the respondent the portion of the debt now sued for which properly formed portion of the assets of the original firm, this payment as against him being no discharge. Unless the estoppel goes this length it is of no avail to the appellant. It may be that the respondent may be estopped from denying that he dealt with an association of persons styling themselves Said and Co. But that is equally consistent with that association being a "société en nom collectif" or a "société en commandite" or an "association commerciale en participation." If that be so, he is not estopped from asserting that it is the last mentioned of the three and not either of the others; and if it be this last one, the

members, not forming a "personne morale," must sue in their own names. Two cases were relied upon on behalf of the appellants, namely, (1) *Goolam Hossen Mamode and Co.* v. *O. L. Narainsamy Chetty and Co.*: *Decisions of the Supreme Court of Mauritius, vol. 7, p.* 99, and (2) that reported at pp. 120 and 121 *Dalloz* (1848). In the first of these a partnership "en nom collectif" had apparently been duly constituted by deed, but the formalities prescribed by the 42nd Article of the Code de Commerce had not been observed. The defendant had dealt with the partnership in its partnership name. The case turned upon the construction of the following clause of the article:—

"Ces formalités seront observées, à peine de nullité, à l'égard des intéressés: mais le défaut d'aucune d'elles ne pourra être opposé à tiers par les associés."

And it appears to have been held that the word "intéressés" only included the members of the partnership; that the "société" could not, as against persons other than these members, rely upon the "nullité" brought about by the non-observance of any of the prescribed formalities, and that the defendant, having dealt with the "société" as an existing "société," was equally estopped from relying on this "nullité." The terms of the deed creating the partnership are not stated. It does not appear whether the partnership was created for any and, if so, for what term, and if created for a term whether or not that term had elapsed. All that was decided was that the defendant was estopped from saying a society was a "nullité," *i.e.*, did not exist, which, by dealing with it in its partnership name, he had in effect asserted did exist. The case may have been well or ill-decided. Upon that point it is not necessary for their Lordships to express any opinion, but they are quite clear that it does not apply to the present case, inasmuch as all the formalities prescribed by the 42nd Article were observed in the case of the original "société," the term of whose existence was fixed by deed, and that the article has no application to associations not created by deed.

In the second case a widow, one of the members of a firm, which had continued to carry on business after the term for which it was originally created had expired, settled upon her son-in-law, on his marriage, a certain proportion of her capital in the firm, with a stipulation that it should not be withdrawn from the partnership. What was decided was that this son-in-law was a creditor of his mother-in-law, not of the firm, and that, having regard to the decree made in the case and to the other circumstances, the sum so settled could not be withdrawn from the funds of the partnership so as to defeat the claims of its creditors. It is obvious that this decision does not apply to the present case. Their Lordships are, for the reasons already mentioned, of opinion that the decision appealed from was right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly. At the same time they think that every facility should be given

to the appointment of a liquidator to wind up the affairs of the original partnership, in order, amongst other things, that the defendant may be compelled to pay any debts he may owe to it at least once, and be protected from the risk of having to pay them twice over. This is, of course, without prejudice to any proceedings the above-mentioned second and third firms may be advised to take to recover debts due by him to them respectively.

In the Privy Council.

SAID AND COMPANY, HAVING FOR ITS MANAGER HAJEE MAMODE HOSSEN,

v.

MAMODE HADEE.

DELIVERED BY LORD ATKINSON.

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