KANAPPA CHETTY *v.* WALATHAPPA CHETTY

1903.

January 26.

D. C., Kurunegala, 1,560

Partnership—Ordinance No. 7 of 1840, s. 21 (4)—Agreement for establishing partnership—Custom among Nattukotte Chettics—Use of initials—Vilasam—Evidence Ordinance, s. 98.

Where a plaint alleged that the plaintiff and defendants were partners in trade, including the purchase and sale of lands; that the partners traded under the name and style of "Su. Pa. A. Vee;" and that the fifth defendant, Sekappa Chetty, having bought two estates on behalf of the partnership, sold them fraudulently to the fourth defendant; and where the plaintiffs prayed for a dissolution of the partnership, a cancellation of the deed of sale which conveyed the estates to the fourth defendant, an account of the rents and profits of the two estates, and a partition or sale of the estates,—

Held that, as the agreement for establishing the partnership was not in writing as required by Ordinance No. 7 of 1840, section 21, he could not pray for a dissolution of it; that under section 98 of the Evidence Ordinance he could lead evidence to show that the deed which conveyed the lands to "Su. Pa. A. Vee. Sekappa Chetty" meant, according to the custom of the community of traders to which the parties to the case belonged, a conveyance to Sekappa Chetty for and on behalf of the firm of "Su. Pa. A. Vee," and that the relation of agent and principal between the fifth defendant and the other parties to the case being thus established, the fifth defendant may be ordered to account to his principals for the value of the lands.

MIDDLETON, J.—My view of the latter part of sub-section 4 of section 21 of Ordinance No. 7 of 1840 is that it was intended that the Courts should not enforce any alleged obligations to become or act as a partner, or any agreement in respect of an alleged partnership between persons assuming to be partners without an agreement for partnership in writing; but that, if persons had acted as partners without an agreement in writing, they should not be allowed to take advantage of their own wrong in escaping accounting for money received on behalf of the professed partnership, on the plea that there was no legal partnership in the terms of the Ordinance.

It may be said that the trial of this issue must inevitably involve the giving of parol evidence in support of an alleged partnership; but, even if it does so, I do not think it would be going further than the latter part of sub-section 4 of section 21 of Ordinance No. 7 of 1840 would permit.

ACTION for dissolution of partnership. The case for the plaintiffs was that they and the first, second, fourth, and fifth became partners in trade in 1867, which included the purchase and sale of lands; that they traded together under the name and style of "Su. Pa. A. Vee"; that the fifth defendant, Sekappa Chetty, bought two estates by deed of 30th May, 1881, in which he signed as "Su. Pa. A. Vee Sekappa Chetty"; that this form

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of signature meant " Sekappa Chetty, for and on behalf of the firm of Su. Pa. A. Vee "; and that Sekappa Chetty sold the estates fraudulently to the fourth defendant by deed dated 29th November, 1890, and appropriated the proceeds. Wherefore the plaintiffs prayed that the partnership may be dissolved; the deed of 20th November, 1890, declared null and void; an account of the rents and profits of the two estates be ordered; and a partition or sale of the said estates decreed.

The District Judge dismissed the action, without hearing evidence, on the following grounds, namely, that the agreement for establishing a partnership in 1867, which appeared to refer to a capital exceeding £100, was not in writing as required by Ordinance No .7 of 1840, section 21, and that fraud was not particularly averred in regard to the deed of 1890 sought to be declared null and void.

The plaintiffs appealed. The case was argued in appeal on 18th and 19th December, 1902.

Dornhorst, K.C., for plaintiff, appellants.

Sampayo, K.C., for second, fourth, fifth, and sixth defendants respondents.

Cur. adv. vult.

26th February, 1903. MONCREIFF, J.—

The plaint set up a partnership entered into between the first plaintiff and the first, second, fourth, and fifth defendants, of which the second plaintiff and the other defendants afterwards became members. It is alleged that these persons traded under the name, style, firm, and *vilasam* of " Suna Pana Avenna Veena," lending money and buying, selling, and otherwise dealing with immovable property.

The plaintiffs say that in 1881 the fifth defendant bought, on behalf of the partnership, two properties named Tempane and Woodlands. They ask (1) for a dissolution of partnership; (2) that the deed of 29th November, 1890, by which the fifth defendant fraudulently disposed of the two lands to the fourth defendant, be declared null and void; (3) for an account of the rents and profits of the two lands; (4) for a division and partition, or sale, of the lands; and for other things.

Nine issues were framed; but no evidence was heard, and the Judge dismissed the action with costs, (1) because the agreement for a partnership being oral did not meet the requirements of

Ordinance No. 7 of 1840, section 21; (2) because, in the absence of any allegation of fraud, the plaintiffs could not attack a notarial instrument executed in 1881 by means of parol testimony of an oral agreement affecting immovable property made in 1867. The Judge also referred to a similar case, D. C., Kurunegala, 393, decided by him. That case was not before us; we sent for it and find that the judgment was affirmed on appeal on the ground that the action was prescribed.

Proviso (4) of section 21 of No. 7 of 1840 relieves the rule which requires that an agreement for establishing a partnership, the capital of which exceeds £100, must be in writing and signed by the party making the same or by some person lawfully authorized thereto. Transactions by, or the settlement of any account between, partners may be proved by parol testimony. It is possible to conjecture, but I find it difficult to say, what the concluding words of the proviso mean. I hesitate to say that this case can be proved by parol evidence.

The Judge's second reason seems to be founded on a mistake. As I understand the case, the plaintiffs do not seek to attack the deed of 1881, but to set it up for their own benefit. The question is whether they can do so.

It was urged, on the authority of a familiar principle, that the plaintiffs should be allowed to open up the facts with a view to showing what really occurred. But in *Silva v. Nelson*, cited from *1 Browne 76*, all that Bonser, C.J., said was, that when one is sued upon an alleged oral agreement he is at liberty to show what the real agreement was. The same principle will be found in *Natchia v. Fernando* (*1 Browne*, *396*), where Bonser, C.J., and Browne, J., allowed the defendant to give evidence showing the real terms of an oral agreement "by way of defence only and not of claim." As it would seem, the principle is restricted, and can only be applied by way of exception or defence to a claim. It remains for the Full Court to say what our position is here with regard to resulting trusts and trusts arising from the operation of law.

The plaintiffs, however, say that the fifth defendant is styled *Ana Lana Kana Nana Sekappa Chetty* in his proxy, whereas in the notarial deed of the 30th May, 1881, by which he bought the lands, he appears under the style of *Suna Pana Avenna Veena Sekappa Chetty*. They say that the initials or *vilasam* preceding his name in that deed, and in the deed by which he sold the property in 1890, indicate—when translated or interpreted—that he bought only as their accredited agent, and that they themselves with others were the real vendees. The 98th section

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of the Evidence Ordinance admits evidence " to show the meaning of.....not commonly intelligible characters, of.....technical, local, and provincial expressions, of abbreviations, and of words used in a peculiar sense." I see no reason why the plaintiffs should not be allowed to prove the meaning of these terms, if the meaning is relevant. I assume that we are bound by *Meera Saibo v. Silva, 4 N. L. R. 229*, and that agency may be proved without showing a notarial or written appointment.

What does the *vilasam* mean? Is it merely descriptive, or does it mean that the plaintiffs (among others) bought the lands through the fifth defendant, who was their agent duly authorized thereto? Of course he signed only the deed by which he sold, but the two deeds may be read together. Withers, J., in his judgment in D. C., Kandy, 10,146, filed in this record, says, in reference to a supposed purchase of land by A. B. C. Muttappa Chetty:—

" It was pressed upon us that.....this is a form of latent ambiguity which may be explained by oral evidence directed to satisfy the Court that the actual purchaser was the principal, A. B. C., and not the agent, Muttappa Chetty. But is not this begging the question? There is no ambiguity about the matter. The purchaser so named is Muttappa Chetty, the agent of A. B. C. He is the purchaser and no other; the title is in him."

The learned Judge may be correct in his assertion, but, with all respect, I think there is at least an apparent ambiguity. I find a difficulty which does not appear to have troubled him. In ordinary transactions which do not relate to the conveyance of land, the principal is the party represented by the *vilasam*. The oft-quoted passage in Mr. Lawson's judgment in No. 42,165, D. C., Colombo (see *Meyappa Chetty v. Chittambalam, 2 Browne 396;* and *Bank of Madras v. A. R. S. V. R. Weerappa Chetty, 4 S. C. C. 70*), is to the effect that " A. Ru. Su. Veiy. R. Muttu Ramen Chetty " would mean, according to common usage, " Ana Runa Suna Veiyana Rana & Company, by their attorney or agent or representative, Muttu Ramen."

If the words do not by common usage bear the same meaning in the selling and purchasing of land, if they are in this case merely descriptive of the purchaser Sekappa Chetty, then the judgment of Withers, J., is an authority for us. But in order to satisfy ourselves we must send the case back that the Judge may frame an issue, take evidence, and find whether the meaning put in ordinary transactions by common usage upon an individual name to which a *vilasam* is prefixed, is or is not also attached by common usage in the case of buying and selling land. If it is not

so attached, there is an end of the contention; but, if it is so attached, I see no reason at present why the relation at least of principal and agent should not be taken to have existed between the plaintiffs and the fifth defendant for the purpose of this transaction only. In that case I imagine that parol evidence might be given on an accounting of the extent of the fifth defendant's obligation to the plaintiffs. If the plaintiffs were the true buyers, the fifth defendant has committed a fraud in selling the lands and appropriating the proceeds. The plaintiffs allege that he sold in fraud of their rights. The principle followed in *Davis v. Whitehead (1894)*, *2 Ch. 133*, that the Statute of Frauds was not made to cover fraud, would seem to apply.

According as the District Court Judge finds, he will determine whether there is any necessity for trying other issues. The costs of appeal will be costs in the cause.

MIDDLETON, J.—

I have had the advantage of reading my brother's judgment, with which I practically agree.

I think that the plaint is bad in seeking the dissolution of a partnership which cannot be orally proved. My view of the latter part of sub-section 4 of section 21 of Ordinance No. 7 of 1840 is that it was intended that the Courts should not enforce any alleged obligations to become or act as a partner, or any agreement in respect of an alleged partnership between persons assuming to be partners, without an agreement for partnership in writing; but that, if persons had acted as partners without an agreement in writing, they should not be allowed to take advantage of their own wrong in escaping accounting for money received on behalf of the professed partnership, on the plea that there was no legal partnership in the terms of the Ordinance. In the case before us, if there was ever any professed partnership, it must have practically terminated by act of the parties in 1892, when the first action was brought (see paragraph 5 of the plaint). I see no objection, however, to the plaintiffs claiming to vindicate their title to these two estates either as joint owners with the fifth defendant or as his principals. Their position in the case seems to me to depend on the meaning of the *vilasam* or initials before the name of the fifth defendant in the deed of 1881.

In the case of promissory notes signed in this fashion the Courts here have held that it means by common usage "So and so & Co." by their attorney or agent. What meaning has it in a deed of conveyance of landed property? In my opinion these are

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abbreviations or words used in a peculiar sense which may be interpreted by parol evidence according to section 98 of the Evidence Ordinance. It is not necessary, according to *Meera Saibo v. Silva, 4 N. L. R. 229*, for the plaintiffs to prove the existence of a notarial deed or a written appointment to show the agency of the fifth defendant. I think an issue should be settled to be proved by oral testimony as to the meaning according to common usage of the *vilasam* preceding the fifth defendant's name in the deed. If the *vilasam* proves to be descriptive only of the fifth defendant, then, according to the decision of Mr. Justice Withers, the fifth defendant will be the legal owner, and would have an undoubted right to transfer to the fourth defendant.

If, on the other hand, it appears that it means a number of persons amongst whom the plaintiffs are included by their agent, the fifth defendant, then the plaintiffs' rights will be susceptible of adjustment by accounting. It may be said that the trial of this issue must inevitably involve the giving of parol evidence in support of an alleged partnership; but, even if it does so, I do not think it would be going further than the latter part of sub-section 4 of section 21 of Ordinance No. 7 of 1840 would permit.

To hold this also does not to my mind appear to conflict with the decision at p. 195 of *Vanderstraaten*, as the plaintiffs do not seek to uphold or enforce the continuance of a partnership, but to compel the fifth defendant to account for money alleged to have been received by him while acting as a member of a professed partnership.

Any other material issues consequent on the ascertainment of the meaning of the *vilasam* can be settled by the District Judge if necessary.

Considering the form in which the plaint has been drawn, the costs of this appeal should, in my opinion, abide the event of the action.