1950 *Present:* **Dias S.P.J. and Gunasekara J.**

ARALIAS, Appellant, *and* FRANCIS, Respondent

S. C. 510—D. C. Galle, X591

Partnership—Action for dissolution and accounting—Plea that there was no agreement in writing—Burden of proof—Meaning of "capital"—Prevention of Frauds Ordinance (Cap. 57), section 18.

Where, in an action for dissolution of a partnership, the question was whether the capital of the partnership exceeded Rs. 1,000 and, therefore, required an agreement in writing in terms of section 18 of the Prevention of Frauds Ordinance—

Held, (i) that the onus was on the defendant to furnish strict proof of the existence of facts bringing the case within section 18 of the Prevention of Frauds Ordinance.

(ii) that the capital contemplated by section 18 of the Prevention of Frauds Ordinance was the original capital contributed by the partners and the term did not extend to the amount that stood as capital after additions or withdrawals at any time during the course of the business.

(iii) that stock-in-trade supplied to the partnership by a third party at the commencement of the business and later paid for by the partnership could not be regarded as part of the capital. The capital of a firm is the actual cash and the value of the property contributed by the partners to the common property of the firm to be used for the purpose of the joint business.

APPEAL from a judgment of the District Court, Galle.

E. B. Wikramanayake, K.C., with *Christie Seneviratne*, for plaintiff appellant.

N. K. Choksy, K.C., with *S. W. Walpita*, for defendant respondent.

Cur adv. vult.

June 15, 1950. GUNASEKARA J.—

The plaintiff-appellant alleging a partnership between himself and the defendant-respondent, who is his brother, brought this action for a dissolution of the partnership and an accounting and for the recovery from the defendant of a sum of Rs. 6,382.54 or such sum as might be found to be due to him upon an accounting. The learned District Judge held that there was a partnership as alleged in the plaint but he dismissed the action on the ground that the capital of the partnership exceeded Rs. 1,000 and there was no agreement in writing as required by section 18 of the Prevention of Frauds Ordinance (Cap. 57).

The learned District Judge's finding that there was a partnership is supported by the defendant's own admissions that he and the plaintiff "started the business on a partnership basis" and that a part of the capital was contributed by the plaintiff. In view of this finding the burden lay on the defendant to prove the existence of facts bringing the case within section 18 of the Prevention of Frauds Ordinance—*de Silva v. de Silva* [1].

According to the case for the defendant, which was accepted on this point, the business in question was started on the 9th May, 1935, with a stock-in-trade of the value of Rs. 6,999.22, which was supplied on that day by Mendis, a brother of the parties. The learned District Judge holds that this sum was the capital of the business.

> "By the capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business and intended to be risked by them in that business."
>
> *Lindley on Partnership, Book 3 Chapter 3.*

It appears from the evidence that the goods supplied by Mendis were supplied by him to the partnership (and not to the plaintiff or the defendant) and were later paid for by the partnership (and not by the plaintiff or the defendant). Thus, the evidence of Mendis himself, who was called as a witness by the defendant, is as follows:—

> "The business of M. M. Francis & Co., was started in May 1935. To start that business I bought Rs. 7,000 worth of goods as stock. That sum was paid back by the firm of M. M. Francis & Co."

(M. M. Francis & Co. was the name under which the partnership carried on business.) It seems clear, therefore, that no part of this stock was property contributed by either of the partners to be risked in the business,

[1] *(1935) 37 N. L. R. 276.*

but the whole of it was property purchased by the partnership. It was not part of the capital. " Neither the stock-in-trade nor the assets of the partnership at any particular time necessarily represent the capital of the firm, which is the actual cash and the value of the property contributed by the partners to the common property of the firm to be used for the purpose of the joint business. " *Wickremaratne v. Fernando* [1].

The defendant has also given evidence to the effect that he contributed as capital a sum of Rs. 2,715 on the 10th May, 1935, and the plaintiff a sum of Rs. 2,034 on the 24th May, 1935. The learned District Judge accepts this evidence and holds that even if the value of the stocks supplied by Mendis was not capital, there were these contributions to capital and it is " idle for the plaintiff to state that the business did not start with a capital of over Rs. 1,000 ". Both here and in a later passage in the judgment, where the learned Judge holds that " the registration of the business does not help the case for the plaintiff to establish the fact that the business was run on a partnership basis with a capital of under Rs. 1,000 ", the language of the judgment suggests an asumption that the burden lay on the plaintiff to prove that the capital of the partnership was less than Rs. 1,000. Not only does the burden on this issue lie on the defendant but that burden is, in the language of Sir Thomas de Sampayo in *Sinno v. Punchihamy* [2], a " heavy " one and, in the words of the same distinguished Judge, " 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 ".

The capital contemplated by section 18 of the Prevention of Frauds Ordinance is the original capital contributed by the partners (*de Silva v. de Silva* [1]) and the term does not extend to the amount that may stand as capital after additions or withdrawals at any time during the course of the business (*Sinno v. Punchihamy* [2]). It cannot be said that the defendant has furnished strict proof that the sums of Rs. 2,715 and Rs. 2,034, or either of them, were contributions to the original capital. Indeed the effect of his evidence is that they were contributions made after the partnership had been formed and after it had commenced business on the 9th May, 1935.

In my opinion the defendant has failed to prove the existence of facts that would bring the case within section 18 of the Ordinance. I would set aside the learned District Judge's order dismissing the plaintiff's action and send the case back to the District Court so that an order may be made for the dissolution of the partnership and an accounting and for determination of the plaintiff's claim in due course. The plaintiff will have the costs of the trial that has been held in the District Court and the costs of this appeal. The costs of further proceedings will be in the discretion of the District Court.

DIAS S.P.J.—I agree.

Appeal allowed.

[1] *(1916) 2 C. W. R. 154, at 155.*
[2] *(191) 19 N. . R 43. at 46*