1961 *Present :* **T. S. Fernando, J., and Sinnetamby, J.**

C. S. RATNAM, Appellant, *and* K. M. PERERA, Respondent

S. C. 67 of 1959—D. C. Kurunegala, 11,433

Partnership—Dissolution—Action for accounts—Procedure—Civil Procedure Code s. 508.

Contracts—Interpretation—Emphasis on substance and not on form—Principal and agent—" Commission ".

In an action instituted by a partner against his co-partner asking for accounts of the partnership which has been dissolved, and for a distribution of the profits and assets, the proper course for the Court to adopt is first to decide whether it should call upon the defendant to file an account and for what period and only thereafter, after giving the plaintiff an opportunity to falsify and surcharge, proceed to determine what amounts are due either to the plaintiff or to the defendant, as the case may be.

In construing a contract the Court will look at what the contract really is and not at what the parties say it is. What the Court has to consider is not the mere name given to it but the substance of the transaction and decide what it would in truth and in fact amount to on a consideration of all the facts relating to it.

Plaintiff and defendant entered into a partnership agreement under the terms of which they agreed to become the " Agents " of The Shell Co. of Ceylon Ltd. at Kurunegala and other places. In a subsequent contract between the Shell Co. and the partnership the firm was referred to as the " agent " and the Shell Co. as the " company ". Although the contract stated that the " agent " should serve the company for the purpose of, among other things, " selling, storing and distributing the company's products entrusted to its charge ", it expressly excluded the company from liability to third parties in respect of the partnership's acts, contracts with customers, etc. There were also other terms which offended against the principles governing the law of agency.

Petrol, kerosene and diesoline were consigned to the " agents " to be kept in the installation and issued to customers at prices fixed by the company, and the firm was paid a " commission " or a rebate at a fixed rate in respect of actual sales. In the case of other Shell products, such as lubricating oils, greases, etc., the firm had to pay in advance for them when taking delivery, at certain specified rates, subject to the condition that they should be sold by the firm at rates not above a certain fixed ceiling price and that the services should be paid for by the difference in price between the rate at which it was purchased from the company and the price at which it was sold to the public. It was argued in the present case that the partnership profits related only to the commission in respect of those products which remained the property of the company and were entrusted to the firm for sale on behalf of the company and not to profits realised by the resale of articles purchased outright from the company which on delivery became the property of the agent. It was contended on behalf of the defendant that the profits from the lubricating oil, greases, etc., were solely his, earned by him independently of the partnership and were not included in the partnership agreement.

Held, that the word " agent " in the contract between the company and the firm was used in a commercial and not in the legal sense. Although in the case of the lubricating oils, greases, etc., the arrangement was decribed as a sale to the agent and a resale by the agent, it differed very little, in actual practice, from the arrangement in regard to the petrol, kerosine and diesoline, except that in the case of the latter the amount of profit was fixed whilst in the former, it depended on the price at which the agent resold it, subject to the restricted maximum price. Accordingly, the profits derived from the lubricating oils, greases, etc., were accountable to the partnership.

APPEAL from a judgment of the District Court, Kurunegala.

C. Ranganathan, for the defendant-appellant.

C. Thiagalingam, Q.C., with *C. de Silva*, for the plaintiff-respondent.

Cur. adv. vult.

November 3, 1961. SINNETAMBY, J.—

This is an action by one partner against another asking for an account of the partnership business which had been dissolved, and for a distribution of the profits and assets. It would appear that the plaintiff and the defendant were originally brought together by one Siebel, who was an employee of the Shell Company, for the purpose of conducting the business of the Shell Petrol Station at Kurunegala. The defendant had earlier, in conjunction with one Mendis, been doing this business and had considerable experience in managing such an installation. When the Shell Company terminated its contract with Mendis, Siebel looked out for some responsible person who could in partnership with the defendant carry on the business. The defendant did not have the requisite capital, and on Siebel's suggestion, it was agreed that the plaintiff, who was one of the biggest consumers of Shell products in the district, should be brought into the business as a partner of the defendant. They entered into a partnership agreement, and, in due course, registered the partnership business in terms of the Business Names Registration Ordinance on 29th November, 1943. The certificate of registration has been produced marked D. 170. The business was to commence on 1st January, 1944. The partnership agreement P. 1 was actually drawn up later; viz.: on 13th May, 1944, though the business, in point of fact, commenced on 1st January, 1944.

Under the terms of that agreement, the parties agreed to become the " Agents " of The Shell Co. of Ceylon Ltd. at Kurunegala, and other places: the partnership business was to be conducted under the name of " Ratnam & Perera ": the minimum capital was fixed at Rs. 20,000/- of which Ratnam contributed Rs. 5,000/- and Perera Rs. 15,000/-: provision was made that proper books of accounts be kept and entries of all transactions made in those books: there was a further provision that a trial balance should be struck at the end of every month and that

an annual balance sheet should be struck on the 31st March of each year: the defendant Ratnam was to be the managing partner. In regard to profits, article 14 provided that the "agency commission" which is paid at the end of each month by the Shell Company was to be divided in the proportion of 1/3rd to Ratnam and 2/3rds to Perera. It further provided that neither party should draw "by way of advance or otherwise any other sum from the partnership funds". Article 18 provided that in the event of the partnership being dissolved, the assets shall be divided between the parties in the proportion 1/4th to Ratnam and 3/4ths to Perera.

The partnership business was terminated by the Shell Company on 30th October, 1953, and the present action was instituted by the plaintiff Perera alleging that the defendant had failed to render true and proper accounts and to pay to the plaintiff his share of the capital assets, profits, and agency commission. Plaintiff estimated the amount due to him at Rs. 224,677/- of which Rs. 86,314/- had been paid, and after giving credit to the defendant in Rs. 4,476/13, claimed the balance: the credit of Rs. 4,476/13 was the defendant's share in respect of a business of a like nature which the plaintiff carried on at Malpitiya from 1st November, 1951. In his prayer the plaintiff asked for an order on the defendant to render a true and proper account of the business from its inception till the dissolution of the partnership and for judgment in respect of the amount eventually found by Court to be due to the plaintiff.

The defendant in his answer denied that a cause of action had accrued to the plaintiff and pleaded that the accounts of the partnership were annually balanced and the plaintiff looked into, accepted and acted upon the said accounts as correct and held out to the defendant that he was satisfied with them for the entire period ended 31st March, 1952. He further pleaded that the accounts from 3rd March, 1952, had been duly audited and show a sum of Rs. 7,182/22 as due from the plaintiff to the defendant which he claimed in reconvention. In respect of the Malpitiya Agency he claimed a sum of Rs. 10,000/-. The defendant pleaded prescription as well as estoppel and settled accounts. The plaintiff thereupon filed replication alleging that the conduct of the defendant in relation to the accounts had been fraudulent; and the defendant, having concealed the fraud, was not entitled to plead prescription or estoppel.

The learned Judge, without making any order calling on the defendant to file accounts awarded the plaintiff a sum of Rs. 79,000/- on account of his share of capital profits and assets and allowed the defendant a sum of Rs. 5,000/- on his claim in reconvention in respect of the Malpitiya business. Against this judgment the defendant filed the present appeal; the plaintiff filed cross objections claiming a larger sum than the amount awarded to him.

It is apparent that the first question the learned trial Judge was called upon to determine was whether he should order the defendant to file accounts and if so, for what period, the defendant's contention being

that he had rendered accounts for the period ended March 1952. From the answer it is clear that for the period commencing 1st April, 1952, till the termination of the partnership no accounts had been rendered and the defendant would have been obliged in any event to file an account for at least that period. In regard to the earlier period the learned trial Judge had first to determine whether there were, as alleged, settled accounts and if so, to what extent the plaintiff was entitled to either re-open, or falsify and surcharge those rendered. I have in an earlier case (S. C. 351/58 (F) D. C. Kurunegala No. 5810/M—*Ariya Pathirane v. Robert Watte Pathirane*, S. C. Minutes of 25 July, 1961 [1]) set out the procedure that should be adopted in actions for accounts as between partners; and, if the learned trial Judge had followed that procedure, he would have saved himself much time and trouble and it would have also enabled him to keep the proceedings within reasonably manageable proportions. As I pointed out in my judgment in that case, Section 508 of the Civil Procedure Code expressly provides that in actions of account the court may decide piece-meal upon the matters in issue. In this case the proper course for the Court to have adopted was first to have decided whether it should call upon the defendant to file an account and for what period; and only thereafter, after giving the plaintiff an opportunity to falsify and surcharge, proceeded to determine what amounts were due either to the plaintiff or to the defendant as the case may be. Instead of doing that, the learned trial Judge framed a whole series of issues which covered the question of not only whether the defendant should be ordered to file accounts but also the entire claims of the plaintiff and defendant and included even matters which were admitted. In the result, when the time came for the learned Judge to answer the issues, while he held that the defendant was liable to render accounts, he nevertheless said no purpose would be served by ordering him to do so.

It is the plaintiff's contention that no proper accounts were rendered to him. He admits that monthly statements of commission were sent to him and that annually, for a certain period of time, a statement of the total commission received less total working expenses was sent to him from which the nett income was ascertained and allotted in the proportion of 2/3rds and 1/3rd. It was not suggested that all sums of money shown to be due were paid in accordance with those statements. The statements merely show the amounts payable to each of the parties from the commission received. It certainly was not a balance sheet of the nature contemplated by article 15 of the partnership agreement. Issue 12 is as follows :—

> " Has the defendant rendered to the plaintiff monthly and annually accounts of the partnership as required in the Agreement ? ".

It should immediately have been answered in the negative. Indeed, at the hearing in appeal the learned counsel for the appellant did not contend that the monthly statements, which appear to have been sent, operated in any way as settled or stated accounts; nor could he contend

[1] *(1961) 63 N. L. R. 370.*

that the annual accounts were, as formulated in the issue, in terms of the partnership agreement, which required a balance sheet. A balance sheet should contain several items of account not shown in the statements rendered: there is, for instance, no statement of stocks, no statement of drawings by the partners and no statement of balances due to or from each of them. Issues 13 and 14 are as follows :—

"13. Did the plaintiff—

(*a*) Look into ;

(*b*) Accept ;

(*c*) Act upon

the accounts so submitted to him up to 31.10.51 ?

14. If so, is the plaintiff estopped from claiming an accounting up to that date ? "

They also should have been answered in the negative for the same reason. The plaintiff would have, therefore, been entitled to obtain an order on the defendant to file a statement of his accounts from the date of the commencement of the business.

The item which formed the main contest between the parties related to whether the profits derived from miscellaneous sales of Shell products, other than petrol, kerosene and diesoline, are accountable to the partnership. The defendant contended that it was his separate business and that he was not liable to bring it into the partnership accounts ; but there is an overwhelming body of evidence which shows that the Shell company consigned these miscellaneous articles, consisting mainly of Shell oil and greases to the firm of Ratnam & Perera, that they credited the firm of Ratnam & Perera for payments made in respect thereof, and that they would never have consigned the articles to Ratnam alone : there is also evidence to suggest that payments were made out of partnership funds. At the commencement of the business, Shell, kerosene, petrol and diesoline were consigned to the " agents " to be kept in the installation and issued to customers at prices fixed by the Company, the partnership being paid a commission or a rebate in respect of actual sales. No payment was made for the petrol, etc., to the Company by the " agent " at the time of delivery. In the case of lubricating oils, and so on, the partnership had to pay in advance, when taking delivery, at certain specified rates, subject to the condition that they should sell it at the installation at rates not above a certain fixed ceiling price. It was contended on behalf of the defendant that the profits from lubricating oil, greases, etc., were solely his, earned by him independently of the partnership and were not included in the partnership agreement. It was argued that the partnership profits related only of the commission in respect of those products which remained the property of the company and were entrusted to the firm for sale on behalf of the company and not to the profits realised by the resale of articles purchased outright from the company which on delivery became the property of the agent.

The learned trial Judge has expressed himself strongly against the credibility of the plaintiff and defendant and was not prepared to act upon the uncorroborated testimony of either of them. The question, therefore, has to be decided on a consideration mainly of the documents and the conduct of the parties. It becomes necessary, therefore, first to examine the agreement between the Shell Company and the partnership. That agreement has been produced marked P.2. The firm of Ratnam & Perera in that agreement is referred to as the " agent " and the Shell Company as " The Company ". Paragraph 1 of that agreement expressly states that the " agent " shall serve the company for the purpose of among other things " selling, storing and distributing the company's products entrusted to its charge ". The expression " company's products " is defined to include petrol, kerosene oil diesel oil, lubricating oil and other goods from time to time entrusted by the company to the agent under this agreement for " selling, distribution and storage ". If, therefore, lubricating oil has been entrusted to the "agent" for storage, sale and distribution, it would clearly come within the ambit of the agreement. It is not denied that lubricating oil, etc., were consigned to the firm, had to be stored in the company's installation, and had to be sold at prices below a fixed ceiling price. The agreement further provided that the agent shall not sell any petroleum products other than the company's products. It is true that paragraph 18 provides that in consideration of the services to be rendered by the agent the company shall pay to the agent " a commission at a rate to be fixed in writing and that such commission is to be paid monthly ", that paragraph 6 provides that the property entrusted to the agent for sale shall remain the property of the company until sold, and that paragraph 8 provides that the agent shall sell the products at prices fixed by the company. It was contended on behalf of the defendant that this agreement applied only to Shell diesoline and kerosene oil, in respect of which a " commission " was paid at rates which had been fixed earlier in a letter addressed to the firm by the Shell Company dated 3rd December, 1943, marked D. 95. The rate of commission on petroleum products like petrol and kerosene is mentioned, but no mention is made of lubricating oil nor is there any reference to diesoline. In the case of petrol, lubricating oil, and diesoline, no payment was made at the time of delivery by the company to the agents ; the petrol, kerosene, and diesoline had to remain the property of the company and the agent had to sell it at a fixed price. He had to make a return weekly showing the quantities sold and on those he was allowed a commission at a certain specified rate per gallon. In the case of lubricating oil the remuneration for the agent's services took, as stated earlier, a different form. According to the agreement, therefore, in the case of petrol, kerosene, and diesoline, commission at a fixed rate was paid but in the case of lubricating oil and other miscellaneous articles, the services were paid for by the difference in price between the rate at which it was purchased from the company and the price at which it was sold to the public. In actual practice, as would appear from the statements of accounts rendered to the

firm, credit was allowed even in respect of greases and oils delivered to the firm. The evidence of the company's representative is that the greases and oils would never have been sold to Ratnam in his individual capacity. It was sold to the firm and it had to be kept in the company's premises at Kurunegala, where the oil pumps and tanks were installed and it had to be sold there. Clearly, although in the case of the oils, etc., the arrangement was described as a sale to the agent and a resale by the agent, in actual practice, it differed very little from the arrangement in regard to the petrol, kerosene, and diesoline, except that in the case of the latter the amount of profit was fixed whilst in the former it depended on the price at which the agent resold it, subject, however, to a restricted maximum price.

In a contract of this kind, what the Court has to consider is not the mere name given to it but the substance of the transaction and decide what it would in truth and in fact amount to on a consideration of all the facts relating to it, vide *Fernando v. Cooray*[1]. In *Weiner v. Harris*[2] the transaction the Court was called upon to construe was described by the words " sale or return ". Goods were entrusted to a mercantile agent for " sale or return " and the expression " sale or return " in the agreement, it was held, did not make the agent a purchaser. He was remunerated by being given half the excess of his selling price over and above the price he paid for it to his principal. The Master of the Rolls Cozens-Hardy said :—

> " So here the mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real nature of the contract. The Court must look at the contract as a whole and see whether that is the real meaning and effect of it. "

and Moulton, L.J. observed :—

> " I fully agree with what the Master of the Rolls has said, that no phrase can enable a person to misdescribe the contract, but that you must look at what the contract really is and not at what the parties say it is. "

Now the use of the word " agent " in the contract P.2 does not make the defendant firm " agent " in the legal sense of the Shell Company, for if it did, their acts, contracts with customers, etc., would bind Shell Company. The agreement expressly excludes this. There are other terms, to some of which I have already referred, which offend against the principles governing the law of agency. The term " agent " is used in a commercial or complimentary sense and not in the legal sense. As Scrutton L.J. observed in *W. T. Lamb & Sons v. Goring Brick Co.*[3],

> " Anyone with experience of commercial matters knows that in certain trades the word ' agent ' is used without any reference to its meaning at law. "

[1] *(1957) 59 N. L. R. 169 at 179.* [2] *101 Law Times 647.*
[3] *146 Law Times 318.*

Greer, L.J. said in the same case :—

> " It is a somewhat remarkable fact that, notwithstanding the numerous commercial and other cases in which the distinction between the position of a buyer and that of an agent for sale has been stated and interpreted, there are still innumerable people engaged in business who do not understand the simple and logical distinction between a buyer and an agent for sale, and they use the two terms as if they were equivalent, the one to the other. "

In regard to the contention that the profits of the partnership was restricted to the commission paid under paragraph 18 of the contract with the company and was confined to petrol, kerosene, and diesoline, it is difficult to understand why, if that were so, there was express provision in article 14 to the following effect :—

> " but neither party shall draw by way of advance or otherwise any sum from the partnership funds. "

The defendant tried to explain this by saying that this provision was included to prevent partners from drawing the capital they contributed, but it is clear law that no one partner is entitled without the consent of the other partners to withdraw any capital he brought into the partnership business. It was not necessary to include such a provision in a partnership deed nor would the withdrawal of capital be referred to in the way in which this particular provision is worded. Paragraph 14 suggests that apart from the commission payable in respect of kerosene, etc., there was other profit accruing to the firm. If the agency commission on petrol, kerosene and diesoline was the sole source of income of the partnership, how could it have been paid at the end of the month to each of the partners who contemplated selling petroleum products on credit to customers as would appear from article 18 of the partnership deed? The plaintiff tried to give an explanation for this which to my mind is not very convincing. He probably was aware that he was not being paid a share of the profits from the lubricating oils but apparently he did not know the extent of such profits till he started the Malpitiya Agency in 1951. He raised the matter in writing for the first time in his letter P.49 of 13.2.53, complaining of the non-inclusion of the lubricating oil profits in the accounts, and, as the learned trial Judge says, it is extremely likely that he would have complained about it orally earlier. The defendant did not reply to P.49. In fact he says that the arrangement between the partners was that the defendant should appropriate the profits from the lubricating oils to himself. If that was so, he would have immediately so replied to P. 49 ; and, he does not appear to have taken such a forthright attitude even when the representative of the Shell Company discussed matters with the partners with a view to bringing about a settlement. Although the agreement with the Shell Company did not expressly refer to the profits made by the partnership on lubricating oils etc. as " commission " there is not the slightest doubt that that was the remuneration payable by the company to the partners for

handling these Shell products and the word " commission " used in the contract must be considered to include this profit. In this connection it would be relevant to consider the manner in which the agreement was regarded by the parties after D.100 was executed. D.100 is a new agreement which superseded P.2 in regard to motor spirits, and after D.100 was executed, the firm bought petrol in much the same way as it had earlier purchased the lubricating oils. It paid for it at the time of delivery and had to resell it within the company's premises from the company's containers and tanks at prices fixed by the company. The agreement is dated 6.2.1950 and in regard to motor spirits contains the same restrictions as in P.2. The agent who is therein referred to as the " buyer " is required to buy at a certain rate and resell it at a price fixed by the company and notified to the buyer. That agreement also provided for the purchase and resale by the firm of motor lubricants and other petroleum products which the seller considered necessary for the purpose of maintaining a full service. In the case of petrol sales after D.100 was executed, the difference in price was regarded by both the company in their statements to the firm and by the firm as " commission " and were so included in the several commission statements submitted subsequently to the plaintiff by the defendant, such as P.17, P.18, etc. If the defendant's contention in regard to lubricating oil is correct, then, he would not be liable to account for the difference in the purchase price and the resale price of petrol after document D.100 was executed : the firm was, thereafter, not paid a commission as such calculated at a certain rate per cent on the sale price of the petrol but was permitted to retain the profit derived by resale to the public at a higher fixed price.

The reason why the Shell Company adopted the form of agreement set out in D. 100 is not clear ; perhaps, they intended that the risk should pass to their agents on delivery. If so, it has yet to be decided whether they have effectively done so. The " buyer " in D. 100 did not exercise complete ownership of the property sold to him. He could not deal with it in the same way as he could with the other property in his ownership. He could not store it where he liked. He could not sell it at whatever price he liked. His powers were restricted and the new transaction in substance was no different to the old one.

Commission need not necessarily be restricted to a fixed rate. It can be variable but it should be capable of determination. As Jessel M.R. observed in *Ex parte Bright Re. Smith* [1] :—

> " There is nothing to prevent a principal remunerating his agent by a commission varying according to the profit obtained by the vendor. *A fortiori* there is nothing to prevent his paying a commission depending on the surplus the agent can obtain over and above the price which will satisfy the principal. The amount of commission does not turn the agent into a purchaser. The principal says to the agent 'sell my goods and whatever you get for them over and above the price, I am willing to accept shall be your commission'."

[1] *39 Law Times 651.*

In my opinion, therefore, the word " commission " in the agreement P. 2 must be equated to " remuneration " which in one case, namely petrol, was fixed and which in the other case, namely lubricating oils, capable of being fixed on resale. It was a convenient term to use in referring to payments made to the firm for the services by the Shell Company.

Having regard to the principles enunciated in the cases I have referred to and on a consideration of all the terms of the contract between the Shell Company and the partnership and the course of conduct between them, I am of the opinion that the agents did not become purchasers of the lubricating oil, etc., but only, if I may borrow an expression, agents for sale. The mere circumstance that the agents either paid for or were given credit in the books of the company for the cost of lubricating oils, etc., on delivery and had to sell it at the installation at prices below a certain ceiling price does not, in my view, alter the nature of the transaction.

If the plaintiff has based his claim on a secret profit which the defendant as a partner made by using the firm's name and property and using the agreement which the firm had entered into with the Shell Company, no defence whatever would have been available to the defendant and he would have been liable to account for that secret profit. The learned counsel for the appellant, however, contended that that was not the basis on which the plaintiff came into court and this was conceded by the learned counsel for the respondent.

It is to be noted that the defendant produced no books of account. He is alleged to have given them to a person by the name of Chary who was living at the time action was instituted but died subsequently before he could be called as a witness. The books were alleged to have been given to Chary and are not available : the defendant's evidence was that the books have been lost. It is very difficult to accept this story and the learned Judge has rightly rejected it. These accounts alone will show the amount of money derived by the defendant as profits from the sale of lubricants. The defendant deliberately chose to keep them away from the Courts and in the circumstances the court is entitled to draw every inference adverse to the defendant from such refusal. Indeed, the Court would have been perfectly justified in accepting the amount assessed by the plaintiff as the profits derived from the sale of lubricants : fortunately, in this case, there is a statement supplied by the Shell Company and from that it is possible to ascertain the profits. This sum has been fixed by the learned trial Judge at Rs. 60,000 and the amount awarded has not been contested. The learned counsel for the respondent who had filed a cross appeal did not press his cross appeal which related to profits from miscellaneous products other than the lubricating oil. The learned trial Judge has fixed the profits payable from the Malpitiya agency to the defendant at Rs. 5,000 and I see no reason to interfere with that finding.

In the result, the appeal of the defendant-appellant is dismissed with costs and the cross appeal by the plaintiff-respondent is dismissed without costs.

T. S. FERNANDO, J.— I agree.

Appeal dismissed.