1944 *Present:* **Howard C.J. and de Kretser J.**

YOOSOOF, Appellant, *and* HASSAN, Respondent.

84—D. C. Colombo, 12,665.

Partnership—Claim for value of business from defendant—Alternative claim as partner—Parol evidence of partnership to repel plaintiff's claim—Prevention of Frauds Ordinance (Cap. 57), s. 18 (c).

Plaintiff, as administrator of the estate of M, sued the defendant to recover the value of a business which was carried on by the defendant as business manager of M. In the alternative plaintiff pleaded that the defendant was partner with M in the said business and claimed a half share of the business. The defendant pleaded that as business manager of one Ismail, who was the proprietor, he was entitled to a one-third share of the profits and that after the latter's death he was a partner in the business with the widow of Ismail, and that M was only a nominee of the widow.

***Held*, that the defendant was not precluded by section 18 (*c*) of the Prevention of Frauds Ordinance from leading parol evidence of the partnership in order to defeat plaintiff's claim.**

***Held, further*, that plaintiff's alternative claim could not be established in the absence of an agreement in writing.**

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *A. R. H. Canekeratne, K.C., Cyril E. S. Perera, M. I. M. Haniffa* and *H. W. Jayewardene*), for the defendant, appellant.

S. J. V. Chelvanayagam (with him *P. Navaratnarajah*) for the plaintiff, respondent.

Cur. adv. vult.

March 9, 1944. HOWARD C.J.—

The defendant appeals from a judgment of the District Judge, Colombo, ejecting him from the business known as the Jezima Drapery Stores, ordering him to render an account of all the assets of the business reaching his hands up to the time of the death of one Mohideen and thereafter, and to pay to the plaintiff the sum so due on such accounting and in default of so doing within three months of the date of the decree to pay to the plaintiff, as the administrator of the estate of Mohideen, a sum of Rs. 30,000. The said sum was claimed by the plaintiff as the value of the business carried on at No. 10, Main street, Colombo, under the name, firm and style of "Jezima Drapery Stores". It was alleged by the plaintiff that Mohideen was entitled to the entirety of the assets of this

business which since the death of Mohideen had been in the possession of the defendant who wrongfully refused to give it up and account for it. In the alternative the plaintiff pleaded that the defendant was a partner with Mohideen in the said business and claimed the sum of Rs. 15,000 as Mohideen's share in the partnership. The defendant by his answer alleged that the business had been the property of one Ismail Hadjiar. That he, the defendant, was the Manager of the business and entitled to a third share of the profits by agreement between himself and Ismail. That, after the death of Ismail, his widow purchased the said business in the name of Mohideen who held the same in trust for her. That in February, 1932, in consideration of monies due to him as Manager a half share of the business was transferred to the defendant. The defendant with Mohideen were registered as the Proprietors of the business. Since the death of Mohideen the defendant asserted that he had been in exclusive possession and control of the business holding one-half share thereof in his own right and the other half share as the agent of Mrs. Ismail Hadjiar. Since July, 1934, he had been registered as the sole proprietor. The defendant contended that the plaintiff's action was prescribed and that, as the capital of the partnership exceeded Rs. 1,000, the plaintiff cannot in law maintain the action in the absence of a written agreement of partnership.

In deciding in favour of the plaintiff, the District Judge has held that Mohideen was the sole owner of the property and that the defendant was only an employee therein and not a partner. In order to refute the claim of the plaintiff, that Mohideen was the sole owner of the business, the defendant tendered certificates D 9, D 10, D 11 and D 12 of registrations of the business under the Registration of Business Names Ordinance (Cap. 120). These certificates indicated that in February, 1932, the defendant and Mohideen were registered as partners of the business and that in 1934 and 1940 the defendant was registered as sole owner. The learned Judge took the view that, in order to succeed in his defence that he was the sole owner of the business after the death of Mohideen, it was necessary for the defendant to establish that he and Mohideen were partners before the latter died. That documents like D 9 and D 10 did not establish a partnership proof of which was required in accordance with the provisions of section 18 (*c*) of the Prevention of Frauds Ordinance (Cap. 57). The only question is whether the learned Judge was right in coming to this conclusion. Section 18 (*c*) of Cap. 57 is worded as follows:—

> "No promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorized by him or her, shall be of force or avail in law for any of the following purposes:—
>
> (*a*) ————.
>
> (*b*) ————.
>
> (*c*) for establishing a partnership where the capital exceeds one thousand rupees:
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> Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and

> offering in evidence circumstances to prove a partnership existing between such persons, or to exclude parol testimony concerning transactions by or the settlement of any account between partners ''.

The effect of this provision has been considered in various decisions. In *Pate v. Pate*[1] there was no written agreement between plaintiff and defendant though the capital exceeded one thousand rupees. The plaintiff, alleging a partnership between himself and the defendant, brought an action for an accounting and prayed for judgment for such sum as might be found due. It was held by their Lordships of the Privy Council that the action was not maintainable owing to the provision of the Prevention of Frauds Ordinance to which I have referred. At page 291 Lord Sumner stated as follows:—

> '' In their Lordships' opinion the words ' for ' establishing a partnership ' clearly apply to the present case, which was founded on the allegation of an agreement, not expressed in any writing, of which parol evidence was adduced for the purpose of establishing a partnership as the basis of the suit. This agreement, in their opinion, was of no force, and did not avail in law unless it could be brought within the proviso.''

Pate v. Pate was followed in the case of *Idroos v. Sheriff*[2]. In this case the defendant was sued by the plaintiffs, the heirs of one Idroos, for a declaration of title to certain shop goods of the value of Rs. 21,000. The defendant pleaded that he and Idroos carried on business in partnership and that he was entitled to a half share of the business which he valued at Rs. 22,000. He, therefore, claimed a sum of Rs. 11,000 in reconvention. It was admitted that the capital of the partnership exceeded Rs. 1,000. It was held that, in the absence of an agreement in writing for carrying on the business in partnership, the defendant could not succeed in his claim in reconvention. *Pate v. Pate* (*supra*) and *Idroos v. Sheriff* (*supra*) were followed in *Rajaratnam v. The Commissioner of Stamps*[3]. The material part of the headnote to this case is as follows:—

> '' A person, who carried on business under the vilasam S.V., decided in 1929 to admit his two sons into partnership and registered the business under the business name S.V. The business was described as a partnership, the partners being the father and the two sons. No written agreement of partnership was entered into. Although regular accounts were kept, there was no separate account of the capital of each partner nor was the distribution of profits and loss shown as against each partner.
>
> In October, 1933, a document was executed declaring that they had been partners in the business. On the death of the father in December, 1933, it was claimed on behalf of the sons that S.V. had gifted a one-third share of the partnership to each of them and that these shares

[1] *18 N. L. R. 289.*

[2] *27 N. L. R. 231.*

[3] *39 N. L. R. 481*

should be excluded from the property of the partnership passing on the death of S.V. for purposes of estate duty.

Held, that the partnership could not be established in the absence of a written agreement.

Pate v. Pate and *Idroos v. Sheriff* followed."

In the three cases I have cited, the establishment of a partnership was the basis of the suit. The parties endeavouring to establish such a partnership failed in the absence of an agreement in writing. In *Balasubramaniam v. Valliappar Chettiar*[1] it was held that in an action brought by the executor of a deceased person to recover money on the basis of a gratuitous agency between the deceased and the defendant, the defendant is not precluded by section 18 (*c*) from leading parol evidence of a partnership, in contravention of the section in order to exclude the plaintiff's claim. In his judgment, Keuneman J. at page 558, stated as follows:—

> "The present case stands on an entirely different footing. The plaintiff alleges that there was a gratuitous agency on the part of defendant in relationship to Pillai. The defendant seeks to rebut that allegation, and to prove that the relationship between these persons was one of partnership, but that in consequence of the absence of any written agreement, that relationship was of no force or avail at law, and that the plaintiff cannot maintain this action. The defendant cannot be said to found his case on the allegation of partnership, nor to make parol evidence the basis of his suit. On the contrary his allegation is that the relationship between the parties was such that it was of no force or avail at law. If a defendant in this position were not allowed to give such evidence, a ready means would be available for a dishonest plaintiff so to frame his action as to escape the effect of section 21."

I find it impossible to distinguish the facts of the present case, where it is suggested by the plaintiff that the defendant was a business Manager, from those in *Balasubramaniam v. Valliappar Chettiar* (*supra*) where the defendant was a gratuitous agent. The defendant in this case does not found his case on the allegation of partnership nor make parol evidence the basis of his suit. In these circumstances I am of opinion that the learned Judge has not given a correct interpretation of the various cases he has cited. The plaintiff has not established that Mohideen was the sole owner of the business. His claim based on that contention must therefore fail. With regard to the alternative claim that Mohideen was a partner with the defendant, it is quite obvious that this claim is founded on an allegation of an agreement, not expressed in any writing, of which parol evidence was adduced for the purpose of establishing a partnership as the basis of the suit. It must therefore fail.

The appeal must be allowed and judgment entered for the defendant with costs here and below.

DE KRETSER J.—I agree.

Appeal allowed.

[1] *39 N. L. R. 553.*