1958 *Present :* **Weerasooriya, J., and Sansoni, J.**

RAJASEKARAM, Appellant, *and* RAJARATNAM, Respondent

S. C. 515—D. C. Point Pedro, 4323/M

Partnership—Difference between partnership and co-ownership—Equality of shares of partners not essential—Capital over Rs. 1000—Absence of agreement in writing—Admissibility of parol evidence—Death of partner—Continuation of business by surviving partners—Failure to agree in writing—Effect—Prevention of Frauds Ordinance (Cap. 57), s. 18.

A business cannot be a partnership as well as a co-ownership at the same time.

A partnership may in law exist even if the shares of the partners in the business are not equal. The rule that the shares of partners are equal is only a *prima facie* one, to be applied in the absence of an express agreement to the contrary or circumstances from which an agreement to the contrary may be implied.

The absence of an agreement of partnership as required by section 18 of the Prevention of Frauds Ordinance will not preclude a partner, as defendant, from adducing parol evidence of the partnership in order to prevent another partner, as plaintiff, from maintaining an action for an accounting or other relief on the false basis that the business is a co-ownership.

Where a partner dies bequeathing his share of the business to one of the surviving partners who subsequently carry on the business with the self-same assets on the basis of a partnership, but without complying with the imperative provisions of section 18 of the Prevention of Frauds Ordinance, it cannot be contended that there is a co-ownership as between the surviving partners.

It cannot be said of a partner that he owns any portion of the assets and goodwill of a particular branch of the business.

APPEAL from a judgment of the District Court, Point Pedro.

S. Nadesan, Q.C., with *C. Ranganathan* and *V. Ratnasabapathy*, for defendant-appellant.

H. V. Perera, Q.C., with *T. Arulananthan*, for plaintiff-respondent.

Cur. adv. vult.

January 20, 1958. WEERASOORIYA, J.—

The plaintiff-respondent and the defendant-appellant are the sons of one Veeragathipillai who carried on business as a trader, money-lender and pawn-broker under the name of S. V. at Point Pedro with a branch at Jaffna. In 1929, Veeragathipillai gifted a one-third share in the

1—J. N. B 21245—1,995 (2/60)

business to each of the two sons and the business was thereafter carried on by the father and the sons under the name of S. Veeragathipillai and Sons, as appears from a declaration dated the 14th October, 1933, and signed by them of which P36, D3 and D3A purport to be translations and according to which each of them was entitled to a one-third share in the business. Veeragathipillai died on the 3rd December, 1933, leaving a last will which was admitted to probate and under which he bequeathed his one-third share in the business to the plaintiff, who was some 18 years older than the defendant. Consequent on the death of Veeragathipillai, the plaintiff filed the declaration P2 dated the 19th November, 1934, under the Business Names Registration Ordinance (Cap. 120) setting out, as far as was necessary for the purpose of that Ordinance, the altered constitution of the business and describing himself and the defendant as the partners of the firm as from the 3rd December, 1933.

The evidence shows that until the year 1947 the plaintiff and the defendant carried on the business on the footing that the plaintiff was entitled to a two-thirds share and the defendant to a one-third share. The plaintiff's case is that it was on the same footing that the business continued to be carried on until June 1952 when the defendant claimed the sole ownership of the Jaffna branch, of which he was in charge, and thus gave rise to the cause of action pleaded in the plaint, which has been framed on the basis that the relationship subsisting between the parties in respect of the business is one of co-ownership.

The substantial defence taken by the defendant is that the business as carried on by him and the plaintiff is a partnership and not a co-ownership, that although the capital of the partnership was over Rs. 1,000 no agreement in writing and signed by the partners as required by section 18 of the Prevention of Frauds Ordinance (Cap. 57) was entered into and the present action is, therefore, not maintainable. There is a finding by the learned trial Judge, which is supported by ample evidence, that at all times material to this action the capital of the business was far in excess of Rs. 1,000 and this finding was not canvassed at the hearing of the appeal. It is common ground that there is no agreement in writing as required by the relevant provisions of section 18 of the Prevention of Frauds Ordinance in respect of the business carried on by the plaintiff and defendant after their father's death. It would seem to follow, therefore, that if that business is a partnership the plaintiff would be precluded by the same provisions from maintaining any action against his other partner, the defendant, in which the existence of the partnership would have to be established as the basis of the suit, nor could he circumvent those provisions by instituting an action framed on the colourable footing that the business is a co-ownership. The question whether the business is a partnership or a co-ownership is, thus, of vital importance to the decision of this case.

For the purpose of deciding that question it is necessary to consider certain evidence adduced at the trial which has a bearing on it. I have already referred to the declaration P2 in which the plaintiff described himself and the defendant as the partners of the business that was

carried on after the 3rd December, 1933. Annexed to the plaint in this case is a financial statement (also produced in evidence marked P16) of the business for the year ending the 31st December, 1950. There are similar statements for the years 1946 (P11B), 1947 (P17), 1948 (P14) and 1949 (P15). All these statements have been prepared on the basis that the business is a partnership. In P11A dated the 28th April, 1949, which is a communication sent by the plaintiff to the Controller of Imports applying for the inclusion of the name of S. Veeragathipillai and Sons in the list maintained by the Controller for the issue of import licences, the plaintiff has described himself and the defendant as the partners of the firm and given the capital contribution of the two partners as Rs. 600,000 and Rs. 300,000. In the year 1945 the letter D26 was signed and addressed by the plaintiff and defendant to the Bank of Ceylon describing themselves as the " individual partners " of the firm of S. Veeragathipillai and Sons and requesting and authorising the Bank to honour all cheques, orders, bills and receipts signed by any one of them in the name of or on behalf of the firm. D21 to D24 are some of the cheques which were drawn on the Bank of Ceylon in the ordinary course of business by the firm of Veeragathipillai and Sons and signed by the plaintiff as partner. D10 dated the 7th March, 1950, is the plaint in an action instituted by the plaintiff and the defendant as partners carrying on business as S. Veeragathipillai and Sons.

Towards the end of 1951 differences arose between the plaintiff and the defendant which culminated in the present action. As a result of these differences the plaintiff seems to have been at pains on occasions to stress his position as the senior partner of the firm. He has so described himself in his letters D6 dated the 8th May, 1952, D13 dated the 14th May, 1952, D15 dated the 23rd May, 1952, and D25 dated the 7th May, 1952. On the 7th June, 1952, the defendant, in pursuance of an agreement alleged by him in his evidence to have been entered into between himself and the plaintiff (which evidence, however, was rejected by the learned District Judge), made the declaration P4 under the Business Names Registration Ordinance. According to P4 the plaintiff ceased to be a partner of the firm of S. Veeragathipillai and Sons as from the 6th June, 1952, and the defendant became the sole proprietor thereof. This declaration was made without the concurrence or knowledge of the plaintiff but when he came to learn of it shortly afterwards, he sent to the Registrar of Business Names the letter P9 protesting that he was still a " two-third shareholder of the business ". In the affidavit P9*a* which accompanied P9 the plaintiff, while claiming to be " the owner and proprietor of the two-third share ", also asserts that the declaration of the defendant that the plaintiff had ceased to be a partner on the 6th June, 1952, is false.

There is also the evidence of Alagasunderam, the *kanakapulle*, an employee of the firm since 1928 and who was called as a witness by the plaintiff, that the business has been carried on as a partnership and the profits ascertained from time to time and divided between the partners. In giving this evidence he did not differentiate between the periods prior to and subsequent to the death of Veeragathipillai in 1933.

Although the learned District Judge seems to have felt the cumulative force of the evidence outlined by me as indicating a business carried on in partnership since 1933, it would appear from his findings, read with the answers given by him to the specified issues relevant to the question, that he thought that co-ownership also of the business could not be excluded. No authority, however, is given by him, nor was any cited before us, for the proposition that a business can be a partnership as well as a co-ownership at the same time.

The principal reason that appears to have induced the trial Judge to take the view that co-ownership could not be excluded in regard to the business carried on after Veeragathipillai's death is that the shares of the plaintiff and the defendant in the business and the division of the profits between them were in the proportion of two-thirds and one-third respectively and that the inequality of shares is inconsistent with partnership. It is clear, however, from section 24 of the English Partnership Act, 1890, that the rule that the shares of partners are equal is only a *prima facie* one, to be applied in the absence of an express agreement to the contrary or circumstances from which an agreement to the contrary may be implied.

The inferences to be drawn from the evidence relating to the nature of the business carried on after the death of Veeragathipillai are matters in respect of which this Court is not in a less advantageous position than the Court of trial. The plaintiff and the defendant gave conflicting versions on the point but neither of them can be described as a reliable witness and the District Judge had ample grounds for ignoring their evidence (as he seems to have done). One is then left with the evidence of the accountant Kumaraswamy, the *kanakapulle* Alagasunderam and the documentary evidence. Mr. Nadesan who appeared for the appellant rightly stressed the almost insuperable difficulties in the way of a business such as that of the plaintiff and defendant being conducted as a co-ownership; nor has any special reason been disclosed as to why despite these difficulties the plaintiff and the defendant should have decided, while ostensibly carrying on business as partners, that their real relationship should be one of co-owners.

In my opinion the learned District Judge was wrong in holding on the evidence that the business was also a co-ownership. I think no conclusion other than that the business is a partnership is reasonably possible on that evidence.

In view of this finding the only other question which arises for decision is whether the plaintiff's action is maintainable. Mr. H. V. Perera who appeared for the plaintiff readily granted that if the business is indeed a partnership the plaintiff would not be able to maintain an action on the false basis that the business is a co-ownership. He submitted, however, that in law the business was never a partnership, that from its inception after Veeragathipillai's death the business was carried on by the plaintiff and the defendant as co-owners and their relations continued to be such throughout. To put Mr. Perera's argument shortly, on the death of Veeragathipillai in 1933 the plaintiff and the defendant became co-owners of the stock-in-trade and other assets of the business which had been

carried on up to that point of time by the three of them ; and that as regards the new business which was carried on subsequently by the plaintiff and the defendant with the self-same assets, even if they purported to do so on the basis of a partnership, no such relationship could in law have come into existence because of non-compliance with the imperative provisions of section 18 of the Prevention of Frauds Ordinance. Hence the relationship of co-owners, which existed at the inception of the new business, was never superseded by, or merged into, a valid partnership.

For this argument Mr. Perera relied on the wording of the relevant provisions of Section 18 of the Prevention of Frauds Ordinance and on what, in his contention, is the interpretation of those provisions by the Judicial Committee of the Privy Council in *Pate v. Pate* [1]. But that was a case where the action was founded on an allegation of a partnership and although there was no written agreement of the partnership as required by Section 18, parol evidence had been adduced on the plaintiff's behalf at the trial for the purpose of establishing the partnership as the basis of the suit. I do not think that the decision in that case went beyond laying down, as explained by Gratiaen, J., in *The Commissioner of Income Tax v. Allaudin* [2] that " apart from cases to which the proviso applies, the existence of a partnership (whose capital exceeds Rs. 1,000) cannot in the absence of a written agreement be established ' *as the basis of a suit* ', or, to put it in another way, as the foundation of a claim in proceedings before the appropriate tribunal vested with jurisdiction in the matter ". He, therefore, held that in proceedings on a case stated under the Income Tax Ordinance (Cap. 188) the Assessor was not precluded from proving a partnership for the purpose of resisting the assessee's claim to have the assessment reduced upon a false hypothesis.

In *Balasubramaniam v. Valliappar Chettiar* [3] it was held that even in an action between two partners one of them might lead evidence to prove the existence of the partnership (in regard to which there was no agreement in writing as required by section 18 of the Prevention of Frauds Ordinance) by way of defence against the other partner's action for an accounting on the basis that their relationship was one of principal and agent. Keuneman, J., pointed out in that case that if in such circumstances a defendant is not allowed to adduce evidence of the partnership " a ready means would be available for a dishonest plaintiff so to frame his action as to escape the effect of section 21 " (now Section 18 of the Prevention of Frauds Ordinance). So also, in *Yoosoof v. Hassan* [4] the absence of an agreement of partnership as required by section 18 was held not to preclude the defer dant, as a partner, from adducing parol evidence of the partnership in order to defeat the claim of the plaintiff which was based on the allegation that the defendant was only a manager of the business.

I did not understand Mr. Perera to question the correctness of these decisions. As I stated earlier, he was prepared to concede that if, as the defence alleged in the present case, there was in reality a partnership

[1] *(1915) 18 N. L. R. 289.*
[2] *(1953) 54 N. L. R. 385.*
[3] *(1938) 39 N. L. R. 553.*
[4] *(1944) 45 N. L. R. 137.*

between the plaintiff and the defendant, the plaintiff would not be able to maintain an action for an accounting or other relief on the false basis that the business is a co-ownership. But it seems to me that these decisions cannot be regarded as correct if Mr. Perera's argument is to be accepted that non-compliance with section 18 of the Prevention of Frauds Ordinance has the effect that even if parties purport to carry on business on the basis of an informal agreement of partnership, no such relationship is created in law. Since partnership is essentially a legal relationship, there would be no meaning in having held in these cases that a defendant may, within the limits laid down in them, adduce evidence of a non-existent partnership. The proviso to Section 18 contemplates the existence of a partnership, with its legal incidents, notwithstanding that the agreement is not in writing and signed by the parties making the same. In my opinion, non-compliance with Section 18 does not prevent the *creation* of the partnership. All that it does is to prevent evidence of the partnership being adduced in certain circumstances.

It was, accordingly, competent to the defendant in the present case to show that the business between himself and the plaintiff did not constitute a co-ownership but is a partnership. The evidence relating to the nature of that business I have already discussed. Even if on the death of Veeragathipillai and the consequent dissolution of the business which was carried on by him along with the plaintiff and the defendant, it be assumed that by some legal process (which is not very clear to me) the plaintiff and the defendant became co-owners in the stock-in-trade and other assets of that business, it remains to be considered whether they can be regarded as co-owners of the new business that commenced thereafter. The evidence of Alagasunderam is that after Veeragathipillai's death on 3rd December, 1933, business was suspended until the 7th December, 1933, when business was resumed with all the cash, stock-in-trade and other assets which comprised the old business as on the 2nd December, 1933. This evidence is supported by the entries in the ledgers D30 and D31. It is clear, therefore, that all the assets of which the plaintiff and defendant were co-owners (assuming that to be their position originally) were brought by them into the partnership business (as already held by me) which commenced on the 7th December, 1933. Section 20 (1) of the English Partnership Act, 1890, provides, *inter alia*, that property brought into the partnership stock is partnership property and must be held and applied by the partners exclusively for the purpose of the partnership.

A volume of evidence was led at the trial regarding the nature of the business which was carried on by the plaintiff, the defendant and their father prior to the father's death. The plaintiff's case is that after his father gifted a one-third share of the business in 1929 to each of the plaintiff and the defendant the business was carried on by the three of them in co-ownership. Although the trial Judge held with him I am far from convinced that the plaintiff, on whom the burden lay, has established that at any point of time during the relevant period he and the defendant stood in the position of co-owners in respect of the business

and if the occasion had arisen for the matter to be considered in appeal it would have become necessary to review the learned Judge's decision in the light of all the evidence relevant to that question.

On the basis of the trial Judge's findings that the business carried on by the plaintiff and the defendant since 1933 is also one of co ownership, he has held that the plaintiff is entitled to an accounting on the footing of a constructive trust arising under section 96 of the Trusts Ordinance (Cap. 72) in respect of the plaintiff's two-thirds share in the business carried on at the Jaffna branch. No argument was addressed to us by Mr. Perera that if the business is a partnership and not a co-ownership, the plaintiff is entitled to any relief on the basis of a constructive trust by virtue of section 90 or section 96 of the Trusts Ordinance. In my opinion no such relief can be given to the plaintiff under the action as constituted. The only reference in the plaint to a trust is in paragraph 8 of it where the averment is that the defendant is holding the " business carried on at Jaffna, the assets and goodwill thereof, in respect of a 2/3rd share in trust for the plaintiff ".

It is clear that in the case of a partnership it cannot be predicated of a partner that he owns any portion of the assets and goodwill of the business since what is meant by the share of the partner is " his proportion of the partnership assets after they have all been realised and converted into money and all the partnership debts and liabilities have been paid and discharged " (Lindley on Partnership, 11th ed., Bk. 3, Ch. v, p. 427). Still less can it be said of a partner that he owns any portion of the assets and goodwill of a particular branch of the business.

For reasons given by me the judgment and decree appealed from must be set aside and the plaintiff's action dismissed with costs here and in the Court below.

SANSONI, J.—I agree.

Appeal allowed.