[IN THE PRIVY COUNCIL]

1962 *Present:* **Lord Tucker, Lord Hodson, and Mr. L. M. D. de Silva**

R. SIVAKUMARAN (Executor of the Estate of V. Rajaratnam deceased) *and* **V. RAJASEGARAM**, Respondent

PRIVY COUNCIL APPEAL No. 49 OF 1960

S. C. 515—D. C. Point Pedro, 4,323/M

Partnership—Action based on co-ownership—Right of defendant to plead de facto partnership—Capital over Rs. 1,000—Absence of written agreement—Action for accounting—Maintainability—Partners' shares in business—Equality not essential—Prevention of Frauds Ordinance (Cap. 57) s. 18 (c)—Trusts Ordinance, ss. 90, 96.

Where an action is instituted in respect of a business on the false basis that the plaintiff and defendant are co-owners of the business it is open to the defendant to show that the business was carried on by the plaintiff and himself in a de facto partnership and not as co-owners, that there was no agreement in writing as required by section 18 (c) of the Prevention of Frauds Ordinance 1840 and that consequently the action was not maintainable.

In a partnership business it is not essential that the partners' shares in the business should be equal.

A person, who had been carrying on a business, took in 1929 his two sons (the plaintiff and defendant) into the business giving each of them a one-third share in it. An application for the registration of the business under the Business Names Registration Ordinance was made on the 6th March 1929, and the date of the commencement of the business was given there as the 2nd March 1929. The father died in 1933 leaving by will his one-third share in the business to the plaintiff.

The plaintiff instituted the present action against the defendant for a declaration that he, the plaintiff, was the owner of a two-third share of the assets and goodwill of the business and for an order on the defendant for an accounting of all the assets and of the profits of the business from the 31st December 1950. The claim was made on the basis of a co-ownership.

Held, that the evidence led in the case established that the business was a de facto partnership and not a co-ownership, although the shares of the plaintiff and defendant were unequal in the proportion of two-thirds and one-third respectively. The rights of the plaintiff and defendant in the business, derived though they were from the father, were the result of the creation of the de facto partnership and not something independent of it. In the circumstances, since there was no agreement in writing as required by section 18 (c) of the Prevention of Frauds Ordinance, the present action was not maintainable.

Held further, that , in such a case, the plaintiff was not entitled to claim that, under section 96 of the Trusts Ordinance, the defendant must be held to be a trustee for the plaintiff.

APPEAL from a judgment of the Supreme Court reported in *(1958) 61 N. L. R. 337.*

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena*, for the plaintiff-appellant.

Dingle Foot, Q.C., with *D. J. Tampoe*, for the defendant-respondent.

Cur. adv. vult.

February 20, 1962. [*Delivered by* MR. L. M. D. DE SILVA]—

The plaintiff (appellant on this appeal) instituted this action in the District Court of Point Pedro against the defendant (respondent on this appeal) who was his brother for a declaration that he, the plaintiff, was the owner of a two-third share of the assets and goodwill of a business carried on at Jaffna under the name of S. Veeragathipillai & Sons and for an order on the defendant for an accounting of all the assets taken charge of by the defendant and of the profits of the business from the 31st December 1950. He filed with the plaint a balance sheet of the business made up to 31.12.50 audited and certified by duly appointed auditors. He complained that no accounts had been rendered since that date. He further complained that the defendant had taken possession of the business denying the rights of the plaintiff thereto since the 7th June 1952 and was making use of the said business as property belonging solely to him. The claim was made on the basis of co-ownership. The defendant denied the co-ownership. He pleaded that the business had been carried on by the plaintiff and himself in partnership, that there was no agreement in writing as required by section 18 of the Prevention of Frauds Ordinance 1840 and that consequently the action was not maintainable. He also raised certain other defences involving questions of fact which were rejected by the learned trial judge. With regard to these no questions arise on this appeal.

With regard to the question of partnership the learned trial judge held that " though an agreement for a partnership may be inferred the facts of this case taken together do not shut out the existence of a co-ownership ". He held that the plaintiff was entitled to the relief he claimed and entered decree in his favour. On appeal the Supreme Court held that " no conclusion other than that the business is a partnership is reasonably possible ", set aside the learned trial judge's judgment, and dismissed the action.

It is convenient at this stage for their Lordships to examine the provisions of section 18 of the Prevention of Frauds Ordinance (Chapter 57 Ceylon Legislative Enactments) which is as follows :—

" 18. 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 authorised by him or her, shall be of force or avail in law for any of the following purposes :—

(*c*) for establishing a partnership where the capital exceeds one thousand rupees :

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. "

Subsections (*a*) and (*b*) have no bearing upon this case. On the argument on this appeal a business with a capital of over one thousand rupees, carried on without an agreement in writing but with the other elements necessary to constitute a partnership was called a de facto partnership. This term will be used in this judgment to convey the same meaning.

It was held by the Board in 1951 in the case of *Pate v. Pate*[1] and has been settled law since that an action by a partner of a de facto partnership brought against another in possession of the business for an accounting could not be maintained as the plaintiff's rights as a partner could not be established in the absence of a writing. The judgment of the Board also contains the following observations.

With regard to the law relating to partnership it observed at p. 290 " Ordinance No. 22 of 1866 enacted that English law is the law of partnership in Ceylon, but this in no way enlarged or diminished the prior Ordinance No. 7 of 1840. "

Referring to the fact that in particular cases the application of the Ordinance may result in hardship it said at p. 293

" Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good, and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription the policy of which was the prevention of fraud. This the Legislature must be taken to have weighed before enacting the Ordinance. "

Various allegations of reprehensible conduct have been made by the parties against each other. Their Lordships have not considered them to the extent necessary for deciding upon their truth or falsity. As will presently appear, upon the views they have formed, the truth or falsity of these allegations would not affect the result of the case.

Later cases decided by the Supreme Court of Ceylon laid down the principle that a de facto partnership could be alleged and proved to defeat on the facts an action brought by one partner of a de facto partnership against another on a false basis of fact asserted to avoid the necessity for basing the claim on partnership such latter claim being bound to fail for

[1] *(1915) 18 N. L. R. 289.*

lack of a writing. There is no reason why such a course should not be permitted because although the agreement behind a de facto partnership is of no force or avail in law to establish a partnership there is nothing which makes the facts involved in it inadmissible in evidence for the purpose of destroying an allegation of a false set of facts upon which a claim on a false basis is sought to be made. In *Balasubramaniam v. Valliappar Chettiar*[1] the plaintiff, the executor of the will of one Muttiah, founded his claim against the defendant on an allegation that the defendant had been the agent of Muttiah. The defendant denied the allegation of agency and sought to sustain his plea by proving by parol evidence that the true relationship was that of de facto partnership. This he was allowed to do. Keuneman J. said at p. 558

> " 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."

He held that the defendant was entitled to lead such evidence remarking

> "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 " (now section 18).

Their Lordships will now consider the material upon which the Supreme Court came to the conclusion that the business was a de facto partnership and not a co-ownership.

The plaintiff and the defendant are the sons of one Veeragathipillai who carried on business at Jaffna and Point Pedro as a trader in a number of commodities among which were rice, paddy, tiles and timber and also as a money-lender and pawn broker. In 1929 he took the plaintiff and defendant into the business giving each of them a one-third share in it. An application for the registration of the business under the Business Names Registration Ordinance (Chapter 120 Ceylon Legislative Enactments) was made on the 6th March 1929 the date of the commencement of the business being there given as the 2nd March 1929. The business which commenced on that date was no doubt the business of the father and the two sons because Veeragathipillai's business run by himself alone had commenced many years before 1929. In the application in the cage headed " The present name in full of every individual who is partner in the firm " the names of Veeragathipillai, the plaintiff and the defendant have been entered.

Attached to the plaint and pleaded as part of it there is, as stated in the opening paragraph above, a financial statement audited and certified by duly appointed auditors. In this statement under the heading " Profit

[1] *(1938) 39 N. L. R. 553.*

and Loss Appropriation Account " appears an item " Transfer to partners current account " in which money is appropriated to the plaintiff and the defendant. Commenting on this statement and on similar statements for 1946, 1947, 1948 and 1949 the Supreme Court states correctly " all these statements have been prepared on the basis that the business is a partnership ". ' Partnership ' here and in several places in the judgment of the Supreme Court is used in the sense of a de facto partnership.

Mr. Kumaraswamy, a chartered accountant, stated in evidence that the accounts had been kept on the basis of a partnership. Mr. Kumaraswamy had been in close touch with the accounts. His evidence was not rejected and there is no reason to distrust what he said. His evidence covers the period after the death of the father referred to immediately.

Veeragathipillai died on the 3rd December 1933 leaving a last will dated 14th October 1933. By that will he left his one-third share in the business to the plaintiff making provision for such claims as his wife had on it under the law of Tesawalamai applicable to the parties. Those provisions have been complied with and plaintiff without doubt became entitled to his father's one-third share. The plaintiff says that the business was conducted after the father's death in exactly the same way and was of the same nature as in the father's lifetime except that the plaintiff was regarded as entitled to a two-thirds share in place of the original one-third. It is not disputed that till 1952 the business was so carried on. It is to be inferred that on the death of the father there was immediate agreement between the plaintiff and the defendant to carry on the business on exactly the same basis as it had been carried on during the father's lifetime. In 1952 disputes between the plaintiff and defendant came to a head. In view of the decision which their Lordships have arrived at on the question of partnership those disputes are not relevant to the result of the case.

On the 14th October 1933 (the day of the execution of the will) Veeragathipillai, plaintiff and defendant executed a solemn document, presumably to place on record their respective positions with regard to the business, which was produced in evidence by the plaintiff in the father's Testamentary Case Jaffna No. 58. The following is the relevant portion of the translation put in in that case :—

> " Know all men by these presents that we, Sinnathamby Veeragathipillai and sons, Veeragathipillai Rajaratnam and Veeragathipillai Rajasegaram, all of Thondamannar, declare as follows :—
>
> Whereas we are carrying on business in partnership under the name, firm and style of " Veeragathipillai & Sons " in paddy, rice, tiles, teakwood (timber) and tobacco and various other goods and also pawn-broking, and whereas we have registered the said business on 8th day of March 1929, under No. in the Vilasam of " S.V." and

whereas we the three persons are entitled to equal shares in the said Business and whereas it appears to us that it is necessary that we should make a declaration of the same:

Know all men by these presents that we the said Sinnathamby Veeragathipillai, Veeragathipillai Rajaratnam and Veeragathipillai Rajasegaram, declare that we the three persons have equal shares in the partnership business carried on by us under name, firm and style of " S.V." and " S. Veeragathipillai & Sons ".

It was attested by a notary public who stated in his attestation :—

" I, Sinnathamby Subramaniam, Notary Public, Jaffna, do hereby certify and attest that the foregoing Instrument was read over and explained by me."

The same document was put in evidence in the present case by the plaintiff with a translation which has substituted for the word 'partnership' the words 'joint business'. It has to be remembered that in the earlier case (the testamentary case) the present dispute had not arisen.

Several cheques were produced signed by the plaintiff as 'partner'. A plaint was produced in an action brought by the plaintiff and defendant in which they described themselves as partners. After an examination of the documents mentioned above and several other documents in which the plaintiff and defendant described themselves as partners the learned District Judge came to the conclusion that " The inference to be drawn from all these documents in which they have described themselves as partners would be that this business appears to have been carried on on the basis of a partnership. But the matter does not stop there. One has to probe further and consider the other documents and evidence placed in this case to determine whether in fact there was only a partnership that had come into existence or whether the facts could also be consistent with co-ownership." The Supreme Court after examining the same documents and the other evidence said that the only possible conclusion was that the business was a partnership (meaning a de facto partnership). Their Lordships agree with the view of the Supreme Court. Whatever the extent may be in which the " facts could also be consistent with co-ownership " they demonstrate that the plaintiff and defendant regarded themselves as partners and avowedly conducted business on that basis.

An examination of the evidence given by the plaintiff in District Court Case Jaffna 58 Testamentary and the circumstances in which it was given throws considerable light on the matter now under consideration. The case related to estate duty payable on the father's estate. The evidence was given in 1937 before the questions now in dispute between the plaintiff and the defendant had arisen. The plaintiff said—

" This business was registered as partnership business in 1929.

Before it was registered there was a verbal agreement between my father and myself and my brother with regard to this business. My father said that as we have already joined in the business we would be given equal shares in the business with him. In 1929 there was an agreement that this business should be carried on in partnership—1/3rd share each. My father applied for registration of the business."

He was confronted with this evidence in the present action and his answer ran thus

"Q. Did you say " in 1929 there was an agreement that this business should be carried on in partnership " ?

A. I gave evidence in Tamil as " Pangkali ". I do not know how it was interpreted. My lawyers knew the English language. Mr. C. Cumaraswamy was the District Judge and Mr. N. Nadarajah was the counsel who appeared for me in the Testamentary case."

Mr. Cumaraswamy and Mr. Nadarajah are both Tamil gentlemen and it was so stated to their Lordships by counsel on this appeal. There could not have been a blatant mistake on the part of the interpreter because it would have been noticed at once by the Court. There has, in fact, been no complaint that the interpreter has made a mistake in his translation. The case for the plaintiff put at its highest could only be that he used a word capable of being translated into English either as ' partner ' or ' co-owner ', that he meant to convey the meaning of ' co-owner ' and that it has been translated as ' partner '. In support of this position it is pointed out that the trial judge has held that the plaintiff " never appreciated the difference between a partnership and a co-ownership and the legal consequences that flowed directly from them". But the plaintiff was not the only person to whom responsibility for the word ' partner ' in the evidence as translated and recorded is to be attributed. He was advised and represented in Court by lawyers in that case and if the plaintiff had meant to say co-owner and not partner they would have known that fact. They would before taking any part in the proceedings have gone in detail into all the facts and, if such was the case, have known that the interpretation ' partnership ' though it could not be said to be wrong as a matter of language did not carry the connotation that the plaintiff intended. They could have intervened to put the matter right but did not do so. This indicates that the plaintiff did intend to say ' partnership ' and nothing less or more.

It has no doubt to be remembered that in the testamentary case the issue between " partnership " and " co-ownership " had not arisen and plaintiff would have succeeded equally on the basis of " partnership " as on that of co-ownership. But it is not lightly to be presumed that the lawyers who appeared would not have seen to it that the evidence recorded was accurate and precise ; in the background of the rest of the evidence in this case it does not appear that they failed to do so.

The bequest to the plaintiff by the father by Last Will is made in the following language :—

> " Out of the money and articles in the business carried on under the names and style of " S.V., S. Veeragathipillai & Sons ". One third share belonging to the said Veeragathipillai and the whole of our lands, mortgage amounts, Promissory Note amounts, sailing vessels, and boats " Nadai Vaththai " and other movables should devolve on our son Veeragathipillai Rajaratnam."

It is argued that the language is inappropriate if Veeragathipillai had regarded himself as a partner. The language is also inappropriate if Veeragathipillai had regarded himself as a co-owner because (as correctly stated by counsel for the appellant in another connection) a co-owner would own an undivided one third share of each article not a one-third share " out of the articles ". A bequest by a co-owner could have properly taken the form " my undivided one-third share ". Their Lordships do not think any weight can be attached to the language used. In any case even if some weight were to be attached their Lordships are of the view that the rest of the evidence completely outweighs the point sought to be made.

The Supreme Court (Soertsz, J. with whom de Krester, J. agreed) held in Case No. 58 Testamentary Jaffna referred to above (reported in 39 N. L. R. 481) that in 1929 the father gifted a one-third share in the business to each of his sons. It has been argued that the gift so made created a co-ownership. An examination of the judgment of the Supreme Court in that case shows the argument to be erroneous.

The facts relevant to the present case arising from Case No. 58 Testamentary Jaffna are the following. On the death of the father the Commissioner of Stamps took up the position that the whole of the business passed on the father's death and sought to levy estate duty on the value of the whole. The plaintiff (in the present case) resisted on the ground that the father had divested himself of a two-thirds interest in 1929. In the words of Soertsz, J. at p. 484 :—

> " The appellants based their claim on the ground that from March 1929 a partnership had subsisted between them and their father ; alternatively, on the ground that by virtue of what occurred in March 1929 when the business was registered in the names of the three of them there was at least a gift of a one-third of the father's share to each of them and that they took bona fide possession and enjoyment of it immediately and thenceforward retained it to the exclusion of the donor."

He rejected the first ground of partnership because there was no agreement in writing. He said of certain documents produced in the case " This Court held, if I may say so, quite rightly that documents such as these prove that the parties were carrying on business in partnership

and nothing more. They do not prove what section 21 (4) (now section 18) requires namely that the agreement for carrying on the business in partnership was in writing. Consequently the position that results from the evidence in the case is that there was a business conducted by these parties which cannot, however, be adduced to a court of law as a partnership ' of force or avail ' because a rule of evidence stands in the way and prevents it from being so adduced ". He then turned to the second ground. He said "There was the alternative claim that when in March 1929 the deceased admitted his two sons into the business on an equal footing with himself as evidenced by A4 (this is the declaration made shortly before death) there was in effect a gift of a third of the business to each of his sons and that that gift satisfied the condition necessary to ensure that their shares did not pass on death ". After considering various arguments and authorities he upheld this argument. It will be seen that upon the view taken in that case the " gift " was the result of the creation of the de facto partnership. The inference that there was a donation resulting in a co-ownership cannot be drawn from what was held in that case.

The learned District Judge has held

> " In all the circumstances of this case I find that though an agreement for a partnership may be inferred the facts of this case taken together do not shut out the existence of a co-ownership, the character which this business assumed originally. In any event it is my opinion that the vanishing point of co-ownership has not been established in this case."

Their Lordships do not think that the business ever assumed the character of a co-ownership. They are of the view that the interests of the plaintiff and defendant in the business arose at the moment they were taken into the business and constituted partners. The application for registration as partners under the Business Names Registration Ordinance was made on the 6th March 1929 and the date of commencement of the business appears from the said application to have been the 2nd March 1929 immediately before the application. There is nothing to warrant the view that there were two separate acts one of donation and another of the creation of a partnership. There was in fact a donation because the father ceased to be the absolute owner and the rights of the plaintiff and defendant as partners were dependent on the voluntary parting with absolute ownership by the father ; but those rights of the plaintiff and defendant in the business, derived though they were from the father, were the result of the creation of the de facto partnership and not something independent of it.

An argument was addressed to their Lordships based on the Roman Dutch Law of co-ownership that the parties once having been co-owners never became partners. What has been stated earlier disposes of this argument because their Lordships are of the view that the parties were never co-owners.

The learned District Judge says " even though it could be said in this case that all other conditions existed there certainly was no division of or sharing of profits in this case ". This view would appear to be erroneous. Alagasunderam a witness called by the plaintiff whose evidence there is no reason to doubt said he " had been working as a kanakapulle (accounts clerk) from the time of the late Veeragathipillai " and went on to say " The business has been carried on as partners and profits have been ascertained from time to time and divided between the partners ". If this correction is made in what the learned District Judge said his view would appear to be that all the conditions necessary for a de facto partnership existed.

The Supreme Court said :—

> " 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."

There is much force in the observation. The learned District Judge in more than one place in his judgment indicates that he was influenced by that view. At one point after referring to certain things said and done by the defendant he says " he cannot now be heard to say that the allocation should have been on the basis of 50 : 50 which would be the case if it was a partnership."

Their Lordships will now examine an argument addressed to them that the defendant must be held to be a trustee for the plaintiff. The only basis on which the plaintiff made his claim was co-ownership and upon that basis he pleaded in the plaint that the defendant had since the 7th June 1952 taken possession of the business and that his possession of the plaintiff's share must be held to be in trust for the plaintiff. No other claim on the basis of trust was made so that the claim as made fails on the view that there was no co-ownership. On appeal no argument was addressed to the Supreme Court " 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 96 of the Trusts Ordinance ". It was however urged before their Lordships that in any case the defendant must be held under section 96 to be a trustee for the plaintiff. Section 96 reads :—

> " In any case not coming within the scope of any of the preceding sections where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."

Their Lordships would observe that before the plaintiff can make a " just demand " recognised by law he must be in a position to establish the partnership. This he is unable to do and consequently the argument fails. If the argument prevailed it would mean that in most, if not all, cases a party to a de facto partnership could use the argument to escape from the disabilities imposed on him by section 18 of the Frauds Ordinance and thus reduce the section to one of no consequence. The Legislature could never have intended such a result.

It appears from what has been said that their Lordships are of the view that the business was conducted on the basis of a de facto partnership. Any claim on the basis of partnership would fail and in fact has not been made. The claim on the basis of a co-ownership which has been made must fail because no co-ownership existed. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court be affirmed and the appeal dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed.