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

KANDIAH, Appellant, *and* KANDASAMY, Respondent

S. C. 121—D. C. Jaffna, 5896

Partnership—Stipulation by partner to provide a specified sum as capital—Partial performance of it—Right to share in the profits of the business.

Plaintiff had agreed to contribute the sum of Rs. 25,000 as his amount of capital in a partnership business. The partnership agreement did not mention a date before which the capital had to be paid by the partners ; nor did it contain any term that a partner who failed to pay his share of the capital in full was not to be entitled to share in the profits of the business.

The capital actually contributed by the plaintiff was only Rs. 13,423·60.

Held, that the plaintiff was entitled to share in the profits of the business notwithstanding his failure to contribute the full capital due from him.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, with *H. C. Keerthisinghe*, for 1st defendant-appellant.

S. J. V. Chelvanayakam, Q.C., with *S. Sharvananda* and *S. Kanagaratnam*, for plaintiff-respondent.

Cur. adv. vult.

September 3, 1958. WEERASOORIYA, J.—

Two questions were argued before us in this appeal. One is a question of fact and the other a question of law. The question of fact is what amount of capital was contributed by the plaintiff-respondent under the agreement 1D4. The full amount which the plaintiff-respondent had to contribute was Rs. 25,000. Although at the commencement of the trial the plaintiff's case was that he had contributed the whole of this sum, he appears to have abandoned that position subsequently. The trial Judge has found that the capital actually contributed by the plaintiff was Rs. 15,423·60. It would appear that this sum is made up of three items, Rs. 8,423·60, Rs. 5,000 and Rs. 2,000. The findings of the trial Judge in regard to the first two of these items were not seriously challenged by learned Counsel for the 1st defendant-appellant, and we see no reason to reject them.

As for the sum of Rs. 2,000, there is no specific finding by the trial Judge that the plaintiff paid this to the 1st defendant-appellant. The plaintiff led the evidence of one Veerasingham who had invested monies with the 1st defendant-appellant. The account P15 shows a balance of Rs. 2,149·08 due from the 1st defendant to Veerasingham in August, 1948. Veerasingham said that he agreed to a sum of Rs. 2,000 out of this amount being paid over by the 1st defendant-appellant to the plaintiff's brother Paramasivam who had married the daughter of Veerasingham's brother. Paramasivam, who was also one of the plaintiff's witnesses, said that the Rs. 2,000 which Veerasingham had requested the 1st defendant to pay to Paramasivam " was invested in the business ", but what the business was had not been made clear. Although the plaintiff's position seems to have been that Paramasivam consented to this sum being utilised by the 1st defendant in the partnership business as part of the plaintiff's capital contribution, Paramasivam was not questioned on the point. Moreover, in the letter 1D9 dated the 28th July, 1949, the plaintiff himself has stated that the capital invested by him in the business consisted of the two items Rs. 8,423·60 and Rs. 5,000. There is no reference to a third item of Rs. 2,000. In the circumstances I would hold that the sum contributed as capital by the plaintiff is Rs. 13,423·60, and not Rs. 15,423·60 as found by the trial Judge.

The question of law is whether the plaintiff, having failed to contribute the Rs. 25,000 which he had agreed on 1D4 to bring in as capital, is entitled to any share at all of the profits. The agreement 1D4 provided for a distribution of the profits (if any) once in six months in respect of the period 1st October, 1948, to the 30th September, 1949. The present action was filed on the 12th September, 1949, for an accounting of the profits of the partnership for the first six months ending on the 31st March, 1949, and for the recovery of the plaintiff's share of those profits.

In *Kandasamy v. Kandiah et al.* [1] an earlier appeal was filed in this very case against a dismissal of the plaintiff's action on a finding against him in respect of the preliminary issue raised at the first trial whether the agreement 1D4 was illegal and contrary to public policy and therefore unenforceable. In the judgment delivered in appeal it was held that the object of the partnership which was brought into existence under 1D4 was " to contribute capital and to share the profits and losses, but not to carry on the business of selling arrack " (i.e., at the particular taverns specified in the agreement and in respect of which the 1st defendant-appellant and the 2nd defendant alone held the exclusive privilege under the Excise Ordinance). The order dismissing the plaintiff's action was set aside and the case remitted for trial on the other issues.

Relying on these findings learned Counsel for the 1st defendant-appellant strenuously contended before us that the contribution by each partner of the full amount of the capital as provided in 1D4 was a condition precedent to his right to share in the profits inasmuch as the essence of the agreement was the contribution of capital and the sharing of profits and losses, and not the carrying on of a business.

The question whether, where it is provided under a partnership agreement that each partner shall bring in a specified sum as capital, how far the fulfilment of that obligation by one of them is a condition precedent to his right to call for fulfilment by the others of their obligations is dealt with in Lindley on Partnership (Eleventh Edition) at page 505, where certain rules stated to have been laid down in a note to *Pordage v. Cole* [2] are set out. Learned Counsel for the 1st defendant-appellant conceded that if these rules are regarded as decisive of the point it would not be possible for him to argue that the particular provision in 1D4 relating to the contribution of capital is a condition precedent. He submitted however that according to the trend of more recent decisions these rules are not to be rigidly adhered to and the test now applied, as stated in Halsbury's Laws of England (Simonds' edition), volume 8, page 199, is " whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the party in default a thing different in substance from what the other party has stipulated for or whether it merely partially affects it and may be compensated for in damages ". See also Pollock on Contracts (Thirteenth Edition), page 211. But even applying such a test it does not appear to me that in regard to the stipulation requiring the plaintiff to provide as capital a sum of Rs. 25,000, the partial performance of it to the extent of providing only Rs. 13,423·60 (as held by me) is rendered a thing different in substance from what the other party had stipulated for, and that the failure to contribute the rest of the capital may not be compensated for in damages.

In holding that the plaintiff was entitled to share in the profits of the business notwithstanding his failure to contribute the full capital due from him the trial Judge pointed out that the agreement D4 does not

[1] *(1954) 57 N. L. R. 115.* [2] *(1669) 1 Wms. Saund. 320 a.*

mention a date before which the capital had to be paid by the partners nor does it contain any term that a partner who failed to pay his share of the capital was not to be entitled to the profits of the partnership. I am unable to say that the learned Judge should not have taken these matters into consideration.

Subject to the variation as to the amount of capital contributed by the plaintiff, as indicated earlier, the appeal is dismissed with costs.

SANSONI, J.—I agree.

Appeal mainly dismissed.