Present: Ennis J. and De Sampayo J. 1915.

ABEYAGOONESEKERA *et al. v.* MENDIS *et al.*

366—D. C. Kandy, 23,632.

Partnership action—Capital over Rs. 1,000—Agreement not in writing—May defendant in his answer admit the partnership, and raise the objection that the agreement is void for want of a written agreement?

In a partnership action, the admission in his answer of the existence of the partnership by a defendant does not prevent him from setting up by way of defence the Ordinance of Frauds and Perjuries, where the agreement is not in writing and the capital of the partnership is over Rs. 1,000.

THE facts are set out in the judgment.

Bawa, K.C. (with him *A. St. V. Jayewardene*), for plaintiffs, appellants.

H. Fernando, for first and second defendants, respondents.

Schneider, for third defendant, respondent.

Bartholomeusz, for the fourth defendant, respondent.

Cur. adv. vult.

November 9, 1915. DE SAMPAYO J.—

This is a partnership action. The plaint stated that the first plaintiff, the defendants, and two others named John Fernando and Don Juanis Appuhamy, had carried on business in partnership as toddy renters from July 1, 1912, to July 31, 1913, under articles of partnership dated June 28, and that at the expiry of the said period the first plaintiff and the defendants continued the said business on certain terms until September 30, 1914, when the alleged partnership was dissolved; and the prayer was for the ordinary partnership accounting. The second plaintiff was joined in the action, as the first plaintiff had assigned his interest to him on February 28, 1914. The defendants pleaded severally. In their answers the defendants *in limine* took the legal objection that, the capital of the business being admittedly above Rs. 1,000, the action could not be maintained in the absence of a written agreement of partnership, as required by section 21 of the Ordinance No. 7 of 1840. The first three defendants proceeded to admit the agreement to carry on business as toddy renters in partnership, but denied the correctness of some of the alleged terms, and the fourth defendant pleaded similarly, but as regards the agreement he emphasized

1915.

DE SAMPAYO J.

Abeyagoonesekera v. Mendis

the fact that it was an invalid parol agreement. At the trial the legal objection was stated as a preliminary issue, and the District Judge, in view of the recent judgment of the Privy Council in *Pate v. Pate*, [1] decided it against the plaintiffs and dismissed the action.

The appeal is supported on two grouds: (1), that the partnership since, July, 1913, was only a continuation of the partnership constituted by the articles of partnership of June 28, 1912, and, therefore the requirement of section 21 of Ordinance No. 7 of 1840 was satisfied; and (2), that the writing provided for by the Ordinance was only a matter of evidence, and that as the agreement was admitted by the defendants the action was maintainable under the proviso to section 21 for the purpose of settling accounts between the partners.

With regard to the first ground, it is to be noted in the first place that the partnership constituted by the written agreement of June 28, 1912, was for the purpose of carrying on certain specific toddy rents for the period ending July 31, 1913, on the footing of licenses already obtained in the name of some of the parties. In the next place, the continuation of the business was not tacit, but a new agreement for the further period of fifteen months was, according to the plaint, entered into. Moreover, the new agreement was neither among the same parties nor, as may be seen from a comparison between the statements in the plaint and the previous written agreement, upon the same terms. The purpose of the new agreement was to buy as many new rents as possible for the further period of fifteen months. New capital was contributed in different proportions, and the shares and interests of the parties were also to be different. I think it is impossible to maintain that the partnership, if any, since the expiration of the period for the carrying on of the old toddy rents, was a mere continuation of the previous partnership.

The main argument, however, related to the second ground of appeal. There is no doubt, as pointed out by the Privy Council in *Pate v. Pate*, [1] section 21 of the Ordinance contained an evidentiary rule. If in any legal proceeding a person has to establish a partnership, the only admissible proof will be that afforded by a writing signed by the parties. The Privy Council contemplated the possibility that if the partnership was admitted, and if thus there was no necessity to establish the partnership, the proviso of section 21 might be availed of for the purpose of settlement of accounts between the partners. Their Lordships, however, did not decide the point, and I think that, if it should arise in a particular case, the principle of such decisions as *Chilton v. Corporation of London* [2] would have to be taken into account. In that case it was laid down that the mere admission of a right which was asserted by the plaintiff, but which had no existence in law, was not sufficient to

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

[2] *L. R. 7 Ch. Div. 735.*

entitle the plaintiff to a judgment establishing the right. Section 21 of our Ordinance declares an agreement, which is not in writing, not to be of "force or avail in law," and the question still remains to be considered whether the policy of law thus enunciated would be met by an admission. In the present case, however, the point does not directly arise. For, what is the extent of the admission in the defendants' answers? It is at most a qualified admission of the agreement upon which the plaintiffs rely. The fourth defendant even calls it an invalid agreement. The answers of all the defendants in effect amount to this: they in the first place take issue with the plaintiffs on the validity of the agreement, and therefore on the legal existence of the agreement, and then pleading to the statement of facts in the plaint, they admit there was an agreement, but on somewhat different terms from those pleaded. It may be remarked therefore that, notwithstanding the admission, the plaintiffs would still have to prove the agreement so far as the terms are concerned. But the main question is, where the defendant demurs to the plaintiff's action on the ground that the agreement declared upon was invalid, but subsequently admits the *de facto* existence of the agreement, whether the demurrer must fail. I do not think so. Counsel for the respondents cited *Walters v. Morgan*,[1] which appears to me to be in point. There the plaintiff claimed specific performance of an agreement to grant a lease, for which there had been no writing as required by the Statute, but admitted the agreement. Lord Chancellor Eyre refused specific performance, observing as follows: "The Court of Exchequer uniformly say that where a defendant insists on the benefit of the Statute, his admission shall not bind him. . . . . for it has been determined that in many cases a defendant cannot protect himself by the Statute from answering the fact that such a parol agreement was or was not made; that it would be the grossest injustice in the world, after making him answer, to turn that admission into the very ground of taking the case out of the Statute." Our system of pleadings similarly requires a defendant in his answer to admit or deny the several averments in the plaint, and it also allows alternative pleading. I think that the ground of the decision in *Walters v. Morgan*[1] applies to this case, and that the admission of the defendants in their answers, such as it is, does not prevent them from setting up the Ordinance of Frauds and Perjuries. This is further supported by *Lucas v. Dixen*.[2] There Lord Esher, Master of the Rolls, said, that if the defendant demurred, and in his demurrer stated that there had been a contract which was of such a kind that had it been in writing it would have entitled the plaintiff to succeed, the defendant's demurrer would be allowed. In the same case Lord Bowen observed: "It was held no doubt that if the defendant admitted his liability, that was sufficient—not on the ground that his

[1] 2 *Cox* 369. [2] *L. R.* (1889) 22 *Q. B. D.* 357.

1915.

SAMPAYO J.

Seyagoone-sekera v. Mendis

admission was a memorandum of the contract, but that it was an admission that there was such a memorandum"; but he added, "that is shown by the fact that, if at the same time he set up the Statute, his admission did not operate". In my opinion the second ground of the appeal in this case also falls.

The appeal should, I think, be dismissed, with costs.

ENNIS J.—I agree.

Appeal dismissed.