

6/1962

IN THE PRIVY COUNCIL

ON APPEAL FROM HER MAJESTY'S No. 49 of 1960
COURT OF APPEAL FOR EASTERN AFRICA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
STUDIES
29 MAR 1963
25
LONDON

SUPREME COURT OF CEYLON

BETWEEN

RAJARATNAM SIVAKUMARAN
(Substituted for Veeragathi Pillai
Rajaratnam deceased Plaintiff)

Appellant

and

68181 VEERAGATHIPILLAI RAJASEGARAM
(Defendant)

Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 20th day of January 1958 setting aside a Judgment and Decree of the District Court of Point Pedro, dated the 5th day of August 1955 whereby, in an action instituted against the Respondent on the basis of co-ownership in a business, it was declared that the plaintiff was entitled to a two-thirds share in the said business and the defendant to a one-third share in the same and it was ordered that accounts between the two parties should be rendered on that basis.

pp 297-304
pp 304-305
pp 254-281
pp 282-283

In setting aside the said Judgment and Decree of the District Court, the Supreme Court dismissed the action with costs in both Courts.

pp 304, 11.
21-23

2. The main question for determination on this appeal is whether or not, on the evidence before the Courts below, it was a correct and reasonable inference that the business which was carried on for profit by the two brothers

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who were parties to the action was carried on by them as partners (as was found by the Supreme Court) or as co-owners and partners simultaneously (as appears to have been the view of the District Court.)

It is the Respondent's case that the said business, with a capital considerably in excess of Rs. 1,000, was carried on from its inception as a partnership without any written agreement and, as such, it came within Section 18 of the Prevention of Frauds Ordinance (C.57); and that, therefore, the action was not maintainable even although it was based upon an alleged co-ownership between the plaintiff and the defendant and not upon a partnership or upon a relationship which was simultaneously both a partnership and a co-ownership as appears to have been found by the District Court.

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3. The relevant portion of Section 18 of the Prevention of Frauds Ordinance (C.57) 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:

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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 parole testimony

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concerning transactions by or the settlement of any account between partners."

As to the Ceylon law of partnership, generally, it is conveniently stated here that the English Law of Partnership was introduced into Ceylon by the Civil Law Ordinance (C.66) and, subject to other provisions relating to the subject-matter made by other Ordinances, is still in force in Ceylon.

4. The facts are as follows:-

Prior to the year 1929, one Sinnathamby Veeragathipillai (hereinafter also referred to as "S.V.") carried on business at Jaffna, and at Point Pedro, in rice, paddy, tiles tobacco, timber, etc., and as a pawnbroker and moneylender.

p 30,11
16-29
p 146,11
17-24
p 298,11
1-9

S.V. had several children and, of these, he, in 1929, brought into his business two of his sons: Rajaratnam (who later became the Plaintiff in these proceedings) and Rajasegaram (the Defendant, and now the Respondent) who was his youngest child.

On the 2nd day of March 1929, S.V. applied, under the Business Names Registration Ordinance (C.120), for registration of the business under the business name of "S.V." and, in his application, he set out the names of himself and his said two sons as partners in the firm of "S.V."

Ex P1.
p 328

S.V. died on the 3rd day of December 1933, and by his last will, made jointly with his wife and dated the 14th day of October 1933, he purported to leave to the said Rajaratnam (later in these proceedings "the Plaintiff"):

p 298,11
11-15

Ex P21
p 337,11
28-30

4.

"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."

Ex P.2
pp 355-
356

On the 19th day of November 1934, S.V.'s surviving partners filed a Statement of Change of Business Names Registration under Section 7 of the Business Names Registration Ordinance (C.120). In this Statement the name of the business was altered (from "S.V.") to "S. Veeragathipillai and Sons", the name of S.V. "the first partner" (now deceased) was deleted, the names of the said two sons of S.V. - Rajaratnam and Rajasegaram - were inserted as "the other two partners", and the date of change was stated as "3rd December, 1933."

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Ex P.4
p 568
Ex P4A
p 569

5. Thus reconstituted the new business continued to be carried on by the said two sons of S.V. without any major incident until the 7th day of June 1952, when the younger son Rajasegaram (the present Respondent) applied to the Registrar of Business names, Northern Province, for registration of his name as sole proprietor of the Jaffna Branch of the business as from the 6th day of June 1952, and alleged in his application that his brother Rajaratnam (who subsequently instituted these proceedings) had ceased to be a partner. The change was registered on the 11th day of June 1952, and the 31st day of October 1952. The Respondent's reasons for taking this step are referred to in paragraph 7 (7) hereof.

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Ex P5
p 571
Ex P6
p 572

6. Aggrieved by the said change of registration the elder brother Rajaratnam

(hereinafter also called "the Plaintiff") instituted the present proceedings against the Respondent (hereinafter also called "the Defendant") in the District Court of Point Pedro.

By his Plaintiff, dated the 28th day of July 1952, the Plaintiff said, inter alia, that:-

pp 30-32

10 (1) In 1929 S.V. had given a one-third share of his business to each of his two sons (the Plaintiff and the Defendant) and retained a one-third share for himself and that thereupon each of the three became entitled to "an undivided one-third share of the said business which was carried on under the name of "S. Veeragathipillai and Sons." p 30,11
21-29

20 (2) S.V. died on the 3rd day of December 1933, and by his last will he bequeathed his one-third share of the business to the Plaintiff who thus became entitled to a two-thirds share upon which footing the business was carried on by the Plaintiff and the Defendant at Point Pedro and at Jaffna. p 30,1
30 to
p 31,1.3

30 (3) On the 7th day of June 1952, the Defendant wrongfully applied to the Registrar of Business Names, Northern Province, to have himself registered as sole proprietor of the said business and falsely alleged that the Plaintiff's interest and rights therein had ceased on the 6th day of June 1952. p 31,11
4-10

(4) The Defendant had failed to render accounts to the Plaintiff in respect of the Jaffna branch which, to the extent of a two-thirds share therein, he must be regarded as holding in trust for the Plaintiff. p 31,11
16-30

(5) The value of the Plaintiff's two-thirds share amounts to Rs. 600,000. p 31,11
38-39

6.

The Plaintiff prayed -

X p 32,11
1-12

"(i) that he be declared entitled to two-thirds owner (sic. share?) of the said business the assets and goodwill thereof;

"(ii) that the Defendant be ordered to render an account of all assets taken charge of by him and other assets and profits thereafter coming into Defendant's possession from time to time in the course of carrying on the said business. 10

"Or in the alternative

"(iii) that the Defendant be ordered to pay to the Plaintiff the said sum of Rs. 600,000;

"(iv) for costs, and for such other and further relief as to the Court shall seem meet."

pp 112-
115
p 112,11
19-20

7. By his amended Answer, dated the 2nd day of March 1954, the Defendant denied all averments in the Plaint inconsistent with the said Answer and said, inter alia that:- 20

p 112,11
31-36

(1) The business had been carried on in partnership between S.V., the Plaintiff, and the Defendant from 1929 until S.V's death in 1933 when the partnership was dissolved.

p 113,11
1-4

(2) The capital of the said partnership of S.V. and his two sons was over Rs. 1,000 but, nevertheless, the partners had not entered into any written agreement as is required under Section 18 of the Prevention of Frauds Ordinance (C.57). 30

(3) Following S.V's death, the Plaintiff and the Defendant carried on business as partners from the 3rd day of December 1933, up to the 5th day of June 1952, under the name of "S. Veeragathipillai and Sons." p 113,11
5-8

(4) The capital of this new partnership was also over Rs. 1,000 but, nevertheless, as previously, there was no written agreement. p 113,11
9-12

10 (5) As partners, the Plaintiff and the Defendant had agreed that they should share equally the profits and assets of the said business. p 113,11
12-14

(6) S.V. had not left a one-third share of the business by his will to the Plaintiff. He was not entitled in law to leave any share of the said business whether to the Plaintiff or to anyone else. p 113,11
16-23

20 (7) The Plaintiff and the Defendant-partners in the new partnership - had agreed that the Defendant should take over the Jaffna branch and that the Plaintiff should take over the Point Pedro branch - "after accounts were looked into and the assets of the two businesses separated and divided." Because of considerable delay in the taking of accounts and carrying out the agreement and obstruction by the Plaintiff's children the Defendant terminated the partnership and notified the Plaintiff of this fact on or about the 25th day of May 1952. "Thereafter the Defendant became sole proprietor of the business 'S. Veeragathipillai and Sons' carried on at Jaffna as from the 6th day of June 1952." p 113,11
24-40

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(8) "No trust existed in law as pleaded in favour of the Plaintiff in respect of the Plaintiff's alleged two-third share or any other share The plea of trust . p 114,11
13-18

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referred to is only an attempt to circumvent the provisions of Section 18 of the Prevention of Frauds Ordinance ... and the provisions of law relating to partnership."

p 114,11
24-29 (9) "The Plaintiff cannot maintain this action on the basis that the Plaintiff is the owner of the two-thirds share of the business of 'S. Veeragathipillai & Sons' as the Plaintiff and the Defendant were carrying on business in partnership under the name ... of 'S. Veeragathipillai & Sons' and were not co-owners of the said business." 10

p 114,11
32-42 (10) The said partnership between the Plaintiff and the Defendant is, for reasons stated in (2) and (4) supra, of no force or avail and is unenforceable and the Plaintiff cannot therefore have and maintain this action. 20

The Defendant prayed, inter alia, that the action should be dismissed with costs.

pp 48,55 The Plaintiff's Replication, dated the 30th day of October 1952, and Amended Replication, dated the 5th day of March 1953, are printed on pages 48 and 55 respectively of the Record.

8. Of the forty-six Issues framed at the trial those which would now appear to be relevant were, after an examination of the oral and documentary evidence before him, answered thus by the learned District Judge:- 30

p 273,1.44 "1. Was Sinnathamby Veeragathipillai
to the sole owner of the business carried on
p 274,1.2 at Jaffna and at Point Pedro under the

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name "S.V." in rice, paddy, tiles, etc. and as pawnbroker and moneylender prior to the year 1929?

Answer: "Yes".

"2. Did the said Veeragathipillai in or about the year 1929 gift - p 274,11
3-7

(a) a one-third share of the said business to the Plaintiff?

10 (b) a one-third share of the said business to the Defendant?

(c) and reserve unto himself the balance one-third share?"

Answers to (a) (b) and (c). In each case - "Yes."

"3. Did the said Veeragathipillai, the Plaintiff and the Defendant thereupon become each entitled to a one-third share of the business?" p 274,11
9-11

Answer: "Yes."

20 "6. Was it one of the devises under the said Last Will" (of Veeragathippillai) p 274,11
20-24
"that the one-third share of the said Veeragathipillai in the said business should devolve on the Plaintiff?"

Answer: "Yes."

30 "7. Did the Plaintiff and the Defendant thereupon become entitled to the business and to the assets and goodwill thereof in the proportion of two-third share and one-third share respectively?" p 274,11
25-29

Answer: "Yes."

p 274,11 "8. Did the Plaintiff and the Defendant
30-35 carry on the said business at Jaffna and at Point Pedro on the footing that the Plaintiff was the owner in respect of a two-thirds share and the Defendant to a one-third share?"

Answer: "Yes."

9. Further relevant Issues were answered thus by the learned District Judge:-

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p 278,11 "31.(a) Did the Plaintiff, Defendant,
12-17 and the deceased Veeragathipillai carry on the business in partnership from 1929 to 3.12.1933 under the name firm and style of S.V.?"

Answer: "Yes. But as stated in the Judgment the facts are not inconsistent with the existence of co-ownership."

p 278,11 "31.(b) Was the initial capital of the
18-21 said partnership business over Rs. 1,000?"

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Answer: "Yes."

p 278,11 "31.(c) Was an agreement in writing
22-25 creating the said partnership entered into among the said partners?"

Answer: "No."

p 278,11 "32. Was the said partnership dissolved
26-29 on the death of the said Veeragathipillai on 3.12.53?"

Answer: "Yes. But co-ownership cannot be excluded."

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"33(a) Did the Plaintiff and the Defendant p 278,11
carry on business in partnership from 3.12.33 30-35
up to 5.6.52 under the name, style and firm
of 'S. Veeragathipillai and Sons'?"

Answer: "Yes, but the facts are not incon-
sistent with the existence of co-ownership."

"33(b) Was the initial capital of the said p 278,11
partnership business over Rs. 1,000?" 36-39

Answer: "Yes."

10 "33(c) Was an agreement in writing creating p 279,11
the said partnership entered into between 1-4
the Plaintiff and the Defendant?"

Answer: "No."

"34. If Issues 31(a) and 31(b) are answered p 279,11
in the affirmative and 31(c) in the negative, 5-10
can the Plaintiff have and maintain this
action in view of the provisions of Ordinance
No.7 of 1840 (the Prevention of Frauds
Ordinance, C.57)?"

20 Answer: "Yes, as this action is on the
basis of co-ownership, the existence of which
cannot be excluded from this business."

"35. If Issues 33(a) and 33(b) are answered p 279,11
in the affirmative and 33(c) in the negative, 11-15
can the Plaintiff have and maintain this
action in view of the provisions of Ordinance
No.7 of 1840 (the Prevention of Frauds
Ordinance, C.57)?"

Answer: "Does not arise."

"40(a) Was the business of S.Veeragathi- p 280,11
pillai and Sons carried on by the Plaintiff 5-10
and the Defendant as partners (as the

Defendant maintains) or as co-owners (as the Plaintiff maintains)?"

Answer: The facts do not shut out either. In any event co-ownership has not been proved to have ended at any time."

p 280,11 "40(b) If the business was carried on
11-14 as a partnership can the Plaintiff maintain this action?"

Answer: "No, but the facts are consistent with co-ownership as well." 10

pp 254-281 10. By his Judgment, dated the 5th day of August 1955, incorporating the said Answers to Issues, the learned District Judge (S. Thambidurai D.J.) held, inter alia, that the Plaintiff had a right to a declaration that he was entitled to a two-thirds share of the business, its assets and goodwill and the Defendant to the balance one-third share of the same; and, further, that the Defendant was liable to render to the Plaintiff an account in respect of all the business assets in his charge and for all profits, and that the accounting should proceed on the said share basis. 20

p 259,1.4 In his Judgment the learned District
to 11 Judge referred to some of the documents
p 260,1. upon which the Defendant had relied in
38 support of his case that the business 30
had been a partnership of S.V. the Plaintiff, and the Defendant, from 1929 to 1933, and that following the death of S.V. on the 3rd day of December 1933, the business had been carried on as a second partnership between the Plaintiff and the Defendant only. He said that there

could be no doubt that these documents bear strong p 261,11
evidence of 'holding out' but the question, to 8-10
his mind, was "whether inter se these parties p 261,11
were partners in this business. In his view 10-17
if the said documentary evidence was the only
evidence available for the determination of
the said question the conclusion might
necessarily be that the parties had not only
held themselves out as partners but were in fact
10 partners inter se "presumably in pursuance of an p 261,11
agreement between them to carry on business as 18-24
such. Further, in his view, the said documents
could also be used as corroborative evidence of
partnership if there was independent evidence of
a partnership inter se. But he referred to
other documentary evidence. He said that: the
account books of the firm showed that, after 1929,
all three partners drew amounts they required -
the amounts being debited to the "S.V. Account
20 which was the common account of the business"; p 261,11
the household expenses of the Plaintiff and the 24-27
Defendant were drawn from the income of the
business and debited to the common account; p 261,11
until 1947, there was no division of profits as 27-29
such and the profits went to swell the common p 262,11
account; and that there was no individual or 13-14
separate account in the name of either of the p 261,11
parties although an accountant could ascertain 29-30
from the books the amount due to each by way of p 262,11
profit at the end of each year. He thought it 2-6
30 probable that there was an implied agreement p 262,11
between the parties not to divide the profits 14-19
but to allow them to accumulate. In his view
the division of profits and sharing in them
was an essential element in partnership and
this appeared to him to be lacking in the
present case.

Examining the documentary evidence the p 263,11
learned District Judge found that during the 23-27
years 1929 to 1933 the Plaintiff and the
40 Defendant (together with S.V. who was then alive)

had purported to act as partners and had described themselves as such a number of documents; and, further, in previous proceedings (D.C. Jaffna No. 58 Testamentary) they had given evidence to that effect. But all this notwithstanding, in his view, the existence of a co-ownership could not be excluded.

- p 263,11 As to the period from 1933 to the
28-43 date of the present dispute (December 10
p 263,11 1951) the learned District Judge referred
38-40 to several documents in which the Plaintiff
p 263,1. and the Defendant were described as partners
44 to and to accounts which were kept "on the
p 264,1. basis on which partnership accounts are
30 kept"; to several documents in which the
 Plaintiff had described himself as a
 partner; and to cheques which the
 Plaintiff had issued as a partner. He
 referred also to the testimony of 20
 S. Cumaraswamy (or Kumaraswamy), an
 Accountant who had prepared the firm's
 accounts for many years and who, testifying
 for the Plaintiff, had stated that the
 accounts had been kept on the basis of a
 partnership and that he had allocated the
 profits of the partners on the basis of
 two shares to the Plaintiff and one share
 to the Defendant.
- p 264,11 But as, in an affidavit (P9A/D27) 30
19-27 made on the 28th day of June 1952, the
 Plaintiff had described himself first as a
 "partner" and later as "owner and
 proprietor of a two-thirds share of the
 said business", the learned Judge concluded
 that "he had never appreciated the
 difference between a partnership and a co-
 ownership and the legal consequences that
 flowed directly from them."

13. From his examination of certain documents the learned District Judge drew the inference that "the business appears to have been carried on as a partnership". But his examination of certain other documents led him to the conclusion "that though this business was carried on in common with a view to profit the Plaintiff was in bona fide possession of a two-thirds share of the business and the Defendant a one-third share of it and that this position continued until December 1951, when the Defendant started disputing it." This conclusion, taken together with the evidence which indicated that no separate accounts were opened in the names of either of the parties, and the Defendant's evidence in Court that "at no point could either the Plaintiff or I say how much was to the credit of either of us by way of profits", led him to the finding that in all the circumstances of the case although an agreement for a partnership might be inferred the facts "do not shut out the existence of a co-ownership the character which this business assumed originally"; and that "in any event ... the vanishing point of co-ownership has not been established in this case."
- The learned Judge said that the Plaintiff had sought relief on the basis of co-ownership and this he was entitled to if his case was supported by evidence even although from the facts "another relationship may be inferred."
- As to the capital of the business, the learned District Judge, for reasons that he gave, found that -
 "at all times material to this action the capital was well over Rs. 1,000."
14. A Decree in accordance with the Judgment of the learned District Judge was entered on the 5th day of August 1955, and from the said
- p 264,11
39-42
- p 266,1
45 to
p 267,1
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- p 267,11
5-8
- p 267,11
9-11
- p 267,11
21-26
- p 267,11
31-42
- p 267,1
43 to
p 268,1
28
p 268,11
27-28
- p 282

Judgment and Decree the Defendant (present Respondent) appealed to the Supreme Court of Ceylon.

- pp 297-304 15. The appeal was heard in the Supreme Court by a Bench consisting of Weerasooriya J. and Sansoni J. who, by their Judgments, dated the 20th day of January 1958, set aside the said Judgment and Decree of the District Court and dismissed the action with costs in both Courts. 10
- p 298,11 28-30 16. Delivering the main Judgment of the Supreme Court, Weerasooriya J. (with whom Sansoni J. agreed) said that the plaint had been "framed on the basis that the relationship subsisting between the parties in respect of the business is one of co-ownership" and that the substantial defence was that the relationship was one of partnership and not co-ownership, that although the capital of the partnership was over Rs. 1,000 there was no written partnership agreement signed by the parties as was required by Section 18 of the Prevention of Frauds Ordinance (C.57), and that the action was not, therefore, maintainable. As to the capital of the firm the learned Supreme Court Judge referred to the finding of the Court below (which, he said, was supported by ample evidence) that the capital at all material times was far in excess of Rs. 1,000 - a finding which was not canvassed at the hearing of the appeal. 20 30
- p 298,11 37-40

Continuing, the learned Judge said:-

- p 298,1 40 to 299,1. "It is common ground that there is no agreement in writing as required by the relevant provisions of Section 18 of the 7

Prevention of Frauds Ordinance in respect of the business carried on by the Plaintiff and the 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."

17. The learned Supreme Court Judge (Weerasooriya J.) then considered the evidence relevant to the said vital question. He referred to the declaration (P2) under the Business Names Registration Ordinance (C.120) dated the 19th day of November 1934, in which the Plaintiff had described himself and the Defendant as partners in the business carried on after the 3rd day of December 1933; to the financial statements produced by the Plaintiff (p 16, P11B, P17, P14 and P15) for the years 1946 to 1950, all of which had been prepared on the basis that the business was a partnership; to the communication (P11A), dated the 28th day of April 1949, sent by the Plaintiff to the Controller of Imports for the issue of import licences in which he had described himself and the Defendant as partners of the firm of "S.Veeragathipillai and Sons" and had set out the contributions to the firm's capital by both partners respectively; to the letter (D26) signed by both the Plaintiff and the Defendant and addressed by them to the Bank of Ceylon in

p 299,11
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which both had described themselves as the "individual partners" of the said firm and requesting and authorising the Bank to honour cheques, orders, bills, etc., signed by either of them in the name, or on behalf, of the firm; to some of the cheques (D21 to D24) which were drawn on the said Bank and signed by the Plaintiff as partner; to a plaint (D10) dated the 7th day of March 1950, in an action instituted by the parties to the present action as "partners" carrying on business as "S. Veeragathipillai and Sons"; and to the Plaintiff's description of himself as "senior partner" in letters written by him in 1952 (D6, D13, D15, D25). 10

p 300,11
12-18 The learned Judge referred also to the testimony of the Plaintiff's witness Alagasundaram (an accountant who had prepared the accounts of the Jaffna branch of the firm for many years) to the effect that the business had been carried on as a partnership and that the profit had been ascertained and divided between the partners from time to time. 20

18. On the reasons which induced the learned District Judge to arrive at his findings, the learned Supreme Court Judge (Weerasooriya J.) said:- 30

p 300,11
19-26 "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" (see paragraphs 8 and 9 hereof), "that he thought that co-ownership also of the business could not be excluded. No 40

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 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 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."

19. Differing from the learned District Judge on the inferences which could properly be drawn from the evidence in the case, the learned Supreme Court Judge (Weerasooriya J.), whose clear conclusion was that the business was a partnership and not a co-ownership, said:-

"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 left with the evidence of the accountant Kumaraswamy" (or Cumaraswamy), "the kanakapulle Alagasundaram and the documentary evidence. Mr. Nadesan for

p 300,11
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p 300,1
38 to
p 301.
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the appellant" (present Respondent) "rightly stressed the almost insuperable difficulties in the way of a business such as that of the Plaintiff and the 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. 10

p 301,11
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"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."

p 301,11
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20. Continuing, the learned Supreme Court Judge Weerasooriya J.) said that in view of his finding that the business was a partnership (and not a co-ownership) the only other question for decision was whether the Plaintiff's action was maintainable. Examining the argument advanced on behalf of the Plaintiff-Appellant, he said:- 20

p 301,11
14-33

"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 30 40

10 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 as 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 reasons that he gave, the learned
 Judge rejected the said agreement.

20 21. In support of his argument Counsel for
 the Plaintiff-Respondent had cited the Board's
 decision in Pate v. Pate (1915) 18 N.L.R.
 289, P.C. but that decision, the learned
 Supreme Court Judge (Weerasooriya J.)
 explained (as was explained previously by
 Gratiaen J. in The Commissioner of Income
 Tax v. Allaudin (1953) 54 N.L.R. 385) did not
 go beyond laying down that, apart from cases
 to which the proviso to Section 18 (see para-
 graph 3 hereof) applied, the existence of a
 partnership cannot, in the absence of a
 30 written agreement, be established as the
 basis of a suit or as the foundation of a
 claim in proceedings before the appropriate
 tribunal.

p 301,1
 34 to
 p 302,1
 7

40 The learned Judge referred to
 Balasubramaniam v. Valliappar Chettiar (1938)
 39 N.L.R. 553 and to Yoosoof v. Hassan (1944)
 45 N.L.R. 137 in both of which cases, in
 the absence of a written partnership agree-
 ment, the Defendant was allowed to adduce
 evidence to prove the existence of a partner-
 ship. Continuing, he said:-

p 302,11
 11-26

p 302, "I did not understand Mr. Perera (Counsel
1.27 for the Plaintiff-Respondent) to question the
to correctness of these decisions..... It
p 303, seems to me that these decisions cannot be
1.4 regarded as correct if Mr. Perera's
argument is to be accepted that non-
compliance with Section 18..... has the
effect that even if parties purport to
carry on business on the basis of an infor-
mal agreement of partnership, no such
relationship is created in law. Since 10
partnership is essentially a legal relation-
ship, 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. 20

"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.

p 303, "It was accordingly competent to the
11. Defendant in the present case to show that
5-7 the business between himself and the
Plaintiff did not constitute a co-ownership
but is a partnership." 30

22. On the failure of the Plaintiff to
discharge the onus (which was upon him) of
proving that his relationship with the
Defendant was one of co-ownership (and not
partnership) the learned Supreme Court
Judge (Weerasooriya J., with whom Sansoni
J. agreed) said:-

"A volume of evidence was led at the trial p 303,11
 regarding the nature of the business which was 29-34
 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.

10 "Although the trial Judge held with him I p 303,11
 am far from convinced that the Plaintiff, on 34-41
 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
 20 relevant to that question."

23. A Decree in accordance with the Judgment pp 304-
 of the Supreme Court was entered on the 20th 305
 day of January 1958, and from the said
 Judgment and Decree the Plaintiff-Respondent
 applied for leave to appeal to the Privy
 Council which, by Decrees of the Supreme Court, pp 307,
 dated the 21st day of February 1958 and the 322
 28th day of April 1959, was granted.

30 The Plaintiff-Respondent died on the 27th
 day of February 1958, and the present Appellant
 was substituted in his place following an Order p 318
 of the Supreme Court, dated the 18th day of p 321,11
 March 1958, directing the District Court of 29-32
 Point Pedro to substitute a suitable person in p 29,1.
 place of the deceased, and the consequential 34
 Order of the said District Court, dated the
 26th day of March 1959.

The present Respondent respectfully submits that the appeal should be dismissed, with costs throughout, for the following among other

REASONS

(1) BECAUSE it was competent to the Defendant to show, and on the evidence it was clear, that the relationship between the Plaintiff and the Defendant was a partnership which was carried on in pursuance of a parol agreement or understanding to that effect between them, and was not either a co-ownership or simultaneously a co-ownership and partnership assuming that the last-mentioned relationship be possible in law. 10

(2) BECAUSE, on any true or reasonable interpretation of Section 18 of the Prevention of Frauds Ordinance (C. 57), the action was not maintainable as the capital of the said partnership was clearly in excess of Rs. 1,000 and there was, admittedly no agreement in writing between the two partners. 20

(3) BECAUSE the Plaintiff clearly failed to discharge the onus of proof (which was upon him) that the Defendant was not his partner but his co-owner.

(4) BECAUSE the learned District Judge misdirected himself in law in his view that the relationship between the Plaintiff and the Defendant could be, and was, simultaneously, both a partnership and a co-ownership. 30

(5) BECAUSE the learned District Judge was wrong in his view that inequality of shares or omission to provide for the sharing out of profits at certain intervals are factors inconsistent with a true partnership.

(6) Because the Plaintiff was not entitled to any relief against the Defendant in respect of any property in the Defendant's possession on the basis of a constructive trust.

(7) Because, for reasons stated therein, the Judgment of the Supreme Court is right.

DINGLE FOOT

D.J. TAMPOE