

6/1962

IN THE PRIVY COUNCIL

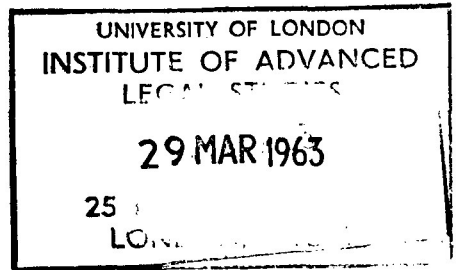
No. 49 of 1960

ON APPEAL FROM  
THE SUPREME COURT OF CEYLON

B E T W E E N :

RAJARATNAM SIVAKUMARAN  
(Executor of the Estate of  
VEERAGATHIPILLAI RAJARATNAM  
deceased (Plaintiff))  
(Substituted Plaintiff) Appellant

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- and -

VEERAGATHIPILLAI RAJASEGARAM  
(Defendant) Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal by the Substituted Plaintiff-Appellant against the judgment and decree of the Supreme Court of Ceylon, dated the 20th January 1958, whereby the Supreme Court (Weerasooriya J. and Sansoni J.) set aside the judgment and decree of the District Court dated the 5th August 1955 and dismissed with costs the action of Veeragathipillai Rajaratnam deceased (hereinafter called "the Plaintiff"). The Plaintiff died after the judgment of the Supreme Court was pronounced and the Appellant was duly substituted in the place of the Plaintiff for the purpose of prosecuting this appeal.
 

p.297.  
p.304.  
p.254.  
p.282.
2. The Plaintiff instituted this action on the 28th July 1952 in the District Court of Point Pedro against the Defendant-Respondent (hereinafter called "the Defendant") for a declaration that the Plaintiff is the owner of a two-thirds share of the assets and goodwill of a certain 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. In the alternative to such accounting the Plaintiff prayed for judgment in a sum of Rs.600,000/-.
 

p.30.

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Record

3. In his plaint dated the 28th July 1952 the Plaintiff pleaded inter alia that:

- p.30, 1.16. (a) prior to the year 1929 Sinnathamby Veeragathipillai, the father of the Plaintiff and of the Defendant carried on a business of which he was sole owner at Jaffna and at Point Pedro;
- p.30, 1.21. (b) in or about the year 1929 Sinnathamby Veeragathipillai gifted a one-third share of the said business to each of his two sons the Plaintiff and the Defendant; and the business was thereafter carried on under the name of S. Veeragathipillai and Sons, the father and the said two sons being each entitled to an undivided one-third share of the business; 10
- p.30, 1.30. (c) Sinnathamby Veeragathipillai died on the 3rd December 1933 leaving a last will dated the 14th October 1933 (Exhibit P21) by which he bequeathed his one-third share of the business together with the assets and goodwill thereof to the Plaintiff who thus became entitled to a two-thirds share of the said business at Jaffna and at Point Pedro. The Plaintiff and the Defendant thereafter continued to carry on the said business at Jaffna and at Point Pedro on the footing that they were entitled to a two-thirds and a one-third share respectively; 20
- p.31, 1.4. (d) On the 7th June 1952 the Defendant fraudulently applied to the Registrar of Business Names to be registered as the sole proprietor of the said business and has since that date denied the rights of the Plaintiff in respect of the said business carried on at Jaffna; 30
- p.31, 1.16. (e) No accounts of the said business carried on at Jaffna have been rendered to the Plaintiff since 1950;
- p.31, 1.24. (f) the Defendant held the assets and goodwill in trust for the Plaintiff in respect of a two-thirds share and was liable to account to the Plaintiff on the footing of the last duly certified audited balance sheet produced with the plaint. 40
- p.43.  
p.45 4. The Defendant filed his answer on the 3rd October 1952 and amended it on the 20th October 1952,

the 19th February 1953 and the 2nd March 1954. In his answer as finally amended he pleaded, inter alia -

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- (a) that Sinnathamby Veeragathipillai did not in or about 1929 gift a third share of the said business to the Plaintiff; p.112, 1.26.
- (b) that between 1929 and the death of Sinnathamby Veeragathipillai on the 3rd December 1933, the said business was carried on in partnership between Veeragathipillai, the Plaintiff and the Defendant without an agreement in writing as required by section 18 of the Prevention of Frauds Ordinance and that after the death of the father, the Plaintiff and Defendant carried on the business in partnership without a written agreement but upon an oral agreement that the parties should share the profits and assets equally; p.112, 1.31.
- (c) that no share of the business devolved on the Plaintiff by virtue of the said last will of the father because the father was not entitled to leave by will his share of the business to anyone; p.113, 1.21.
- (d) that in or about December 1947, it was agreed between the Plaintiff and the Defendant that the Plaintiff should take over the business carried on at Jaffna after the accounts were looked into and the assets of the two businesses separated and divided and that as there was delay in carrying out the agreement, the Defendant terminated the partnership by giving notice to the Plaintiff on the 25th May 1952 and thereafter became the sole proprietor of the said business carried on at Jaffna. p.113, 1.29.
5. The trial commenced on the 28th July 1952 before the Acting District Judge of Point Pedro but upon an application of the Defendant, the Supreme Court ordered the trial to be had before another Judge. p.124.
6. At the fresh trial commenced on the 26th January 1955 46 issues were raised. The first 22 issues relate directly to the averments in the plaint referred to in paragraph 3 hereof. Issues 23 to 30 raised by the Plaintiff were as follows: p.126

Record  
p.129, 1.1.

23. Is the defendant precluded by the orders made in case No. 58 Testamentary D.C., Jaffna from denying that the business of Verragathipillai & Sons was owned in the proportion of 2/3rd share to the plaintiff and 1/3rd share to the defendant?

24. Has the defendant accepted and acquiesced in the devises contained in the said Last Will No.22277?

25. If issue No. 24 is answered in the affirmative, is the defendant estopped from denying that the plaintiff is entitled to a 2/3rd share of the business and the assets and goodwill thereof in terms of the said Last Will? 10

26. Is it open to the defendant to dispute the correctness of the accounts marked 'X' and earlier accounts as pleaded in para. 3 of the replication?

27. If not, is the defendant estopped from disputing the ownership of the said business of the plaintiff and the defendant in the proportion of 2/3rd share and 1/3rd share respectively? 20

28. Did the defendant himself keep the accounts of the said business at Jaffna up to 31.12.50?

29. Were such accounts kept on the footing that the plaintiff owned a 2/3rd share and the defendant a 1/3rd share of the business, the assets and goodwill? 30

30. If issues 28 and/or 29 are answered in the affirmative, is the defendant now estopped from -

(a) denying that the plaintiff is still entitled to a 2/3rd share of the business?

(b) asserting an alleged division in 1947?

(c) asserting that he has become the sole proprietor of the business at Jaffna on 6.6.52? 40

Issues 31 to 35 raised by the Defendant relate to the Defendant's plea that from 1929 up to the 5th June 1952 the said business was carried on as a partnership without an agreement in writing and that the Plaintiff could not therefore maintain the action in view of Section 18 of the Prevention of Frauds Ordinance. Issues 36 to 41 raised by the Defendant, are as follows:-

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p.130, 1.6.

- 10           36. In respect of the partnership business carried on by the plaintiff and the defendant under the name, style and firm of "S. Veeragathipillai & Sons", was it agreed between the parties that they should share equally the profits and losses of the said business after the death of the father on 3.12.33? p.130, 1.28.
37. (a) Did the plaintiff and the defendant carry on the said business of S. Veeragathipillai & Sons at Jaffna and at Point Pedro?
- 20           (b) Was it agreed between the plaintiff and the defendant in December, 1947, that the plaintiff should take over the Point Pedro business after accounts were looked into and the assets of the business divided and separated?
38. (a) Did the defendant terminate the said partnership by notice to the plaintiff on or about 25.5.52?
- 30           (b) Thereafter did the defendant become the sole proprietor of the business of S. Veeragathipillai & Sons carried on at Jaffna as from 6.6.52?
39. Is the defendant under legal liability to render any account to the plaintiff in respect of the business carried on at Jaffna as the plaintiff maintains?
- 40           40. (a) Was the business of S. Veeragathipillai & Sons carried on by the plaintiff and the defendant as partners (as the defendant maintains) or as co-owners (as the plaintiff maintains).

Record

- (b) If the business was carried on as a partnership, can the plaintiff maintain this action.

41. In the event of the Court ordering accounting, should the accounting proceed on the basis -

- (a) that the profits of the business should be shared equally between the partners  
 (b) that the account be taken between partners as from 31.13.23?

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p.132, 1.7.

Issues 42 to 46 raised by the Plaintiff were as follows:-

42. If any of the issues 3, 7 or 20(d) is answered in favour of the plaintiff, is the plaintiff entitled to judgment even if issues 31 to 33 and 36 to 41 are answered in favour of the defendant?

43. Were the agreements alleged in issues 36 and 37 entered into in writing as required by section 18 of Chapter 57?

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44. If not, is the defendant entitled to relief in respect of the claims put forward in issues 38 and 41?

45. Even if the said business was a partnership business, as alleged by the defendant, was the defendant entitled to terminate the same as alleged in issue 38?

46. Even if issue No. 45 is answered in the affirmative -

- (a) Did the defendant become the sole proprietor of the business carried on at Jaffna?  
 (b) Is the defendant liable to account for the assets, profits and goodwill of the said business carried on at Jaffna?

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7. The Plaintiff gave evidence and among the witnesses he called were Nadesar Alagasunderam, the Kanakapulle or accounts clerk of the said business

and Saravanamuttu Kumaramy, a partner of the firm of Chartered Accountants which audited the accounts of the said business. The Defendant gave evidence and called two officials of the District Court and the Bank of Ceylon.

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8. The learned District Judge by his judgment dated the 5th August 1955 declared the Plaintiff entitled to a  $\frac{2}{3}$  share of the assets and goodwill of the said business and ordered an accounting from the 3rd December 1933, the date of the death of the father, in respect of the business carried on both at Jaffna and at Point Pedro. p.254.
9. The learned trial Judge answered in favour of the Plaintiff all the 22 issues relating directly to the averments in the plaint. He held (a) that the father who owned the business gifted a  $\frac{1}{3}$  share of the business to each of his sons (b) that on the death of the father his share of the business devolved on the Plaintiff and that the Plaintiff became entitled to a  $\frac{2}{3}$  share of the business, (c) that after the father's death the Plaintiff and the Defendant carried on business on the footing that they were co-owners in respect of  $\frac{2}{3}$  and  $\frac{1}{3}$  shares respectively. The learned trial Judge also answered in favour of the Plaintiff the issues 23 to 30 relating to estoppels. He held that the Judgement in the case relating to the father's estate in which it was held that the father had gifted a  $\frac{1}{3}$  share of the said business each to the Plaintiff and the Defendant estopped the Defendant from denying that a  $\frac{2}{3}$  share of the business was owned by the Plaintiff and that the Defendant was similarly estopped by his acceptance of and acquiescence in the devises contained in the last Will of his father. The learned Judge further held that the Defendant himself kept the accounts of the business at Jaffna up to 31.12.1950 on the footing that the Plaintiff owned a  $\frac{2}{3}$  share of the business at Jaffna and was therefore estopped from -
- (a) denying that the Plaintiff is still entitled to a  $\frac{2}{3}$  share of the business; p.273.  
p.274, 11.5 & 6.  
p.274, 1.21.  
p.274, 11.25-35.  
p.277, 1.1 to  
p.278, 1.11.
- (b) asserting an alleged division in 1947; and p.277, 1.16.
- (c) asserting that he had become sole proprietor of the Jaffna business on 6.6.52. p.277, 1.12.  
p.277, 1.34.

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10. The issues relating to the defence were answered against the Defendant. Issues 31(a) and 33(a) were answered as follows:-

p.278, 1.12.

31(a). Did the Plaintiff, Defendant 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.?

Yes. But as stated in the judgment the facts are not inconsistent with the existence of co-ownership.

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p.278, 1.31.

33(a). Did the plaintiff and the defendant carry on business in partnership from 3.12.33 up to 5.6.52 under the name, style and firm of "S. Veeragathipillai & Sons"?

Yes, but the facts are not inconsistent with the existence of co-ownership.

It is submitted that when the answers to these issues and to issue 34 are read with the reasons it is clear that the learned Judge's finding was that the Respondent had not proved that co-ownership of the property had been effectively terminated. The learned trial Judge held that there had been no express agreement to create a partnership at any time; and further, that though a partnership might be inferred from some of the documents in the case, the whole of the facts are not inconsistent with the existence of co-ownership. The learned Judge also held that there was agreement in 1947 to share profits equally as alleged by the Defendant and there was no arrangement at any time agreed to by the Plaintiff whereby the Jaffna business was to be handed over to the Defendant.

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p.297.  
p.304.

11. The Defendant appealed and the Supreme Court by its Judgment, dated the 20th January 1958, set aside the judgment and decree of the District Court, dated the 5th August 1955, and dismissed the Plaintiff's action with costs. Weerasooriya J., who delivered the principal Judgment, held -

p.301, 1.9.

(a) that no conclusion other than that the business was a partnership was reasonably possible on the evidence;

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p.303, 1.1.

(b) that where a de facto partnership is proved, non-compliance with the requirements of



section 18 of the Prevention of Frauds Ordinance does not prevent the creation of a de jure partnership and that the legal incidents of partnership would attach to the property brought into the de facto partnership;

- 10 (c) that section 18 of the Prevention of Frauds Ordinance did not legally prevent the Defendant from proving the de facto partnership as a defence to the Plaintiff's action; and p.302.
- (d) that no relief could be given to the Plaintiff on the basis of a constructive trust. p.304, 1.6.
12. It is respectfully submitted that -
- (a) the Supreme Court was not justified in rejecting the findings of fact of the learned trial Judge;
- (b) the Supreme Court misinterpreted section 18 of the Prevention of Frauds Ordinance;
- 20 (c) even if the business carried on by the parties was a de facto partnership the provisions of section 18 prevents the Defendant from proving the said partnership as a defence to the Plaintiff's claim;
- (d) the Supreme Court has wrongly omitted to consider the issues of estoppel on which the learned District Judge held in favour of the Plaintiff;
- 30 (e) even if the property claimed by the Plaintiff had ceased to be co-owned, the Supreme Court was wrong in holding that the Plaintiff's claim to an accounting should be refused. The Defendant was bound in the circumstances to account for the property which had come into his hands both on the ground of trust and the fundamental Roman Dutch rule against unjust enrichment.

40 The Plaintiff respectfully submits that this appeal should be allowed with costs throughout for the following among other

R E A S O N S

- (1) BECAUSE the Supreme Court was not justified in setting aside the findings of fact of the learned trial Judge.
- (2) BECAUSE the Supreme Court misinterpreted the provisions of section 18 of the Prevention of Frauds Ordinance.
- (3) BECAUSE the Supreme Court was wrong in not considering the issues of estoppel in the case.
- (4) BECAUSE the Plaintiff was entitled to an order for an accounting as prayed for on the following grounds: 10
  - (a) by virtue of his rights of co-ownership;
  - (b) in all the circumstances, there was imposed on the Defendant an obligation in the nature of a trust;
  - (c) the refusal of the accounting as prayed for is in violation of the rule against unjust enrichment.

E.F.N. GRATIAEN.

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WALTER JAYAWARDENA.