

SIVASAMI
v.
VINAYAGAMOORTHY

COURT OF APPEAL.
DR. RANARAJA, J.
C.A. 448/94 (F).
D.C. MT. LAVINIA 40/91 (SPL.).
NOVEMBER 8, 1996.

Partnership Ordinance, No. 22 of 1866 – Partnership at will – Need to specify the capital of the partnership – Prevention of Frauds Ordinance, section 18.

The plaintiff-appellant instituted action praying for a decree dissolving an alleged partnership at will. The defendant-respondent raised a preliminary issue, to wit – as set out in the plaint, after the expiry of the Agreement No. 210 of 21.12.90, can the plaintiff have and maintain this action, since the parties have not entered into a fresh partnership agreement? The District Court answered this issue in the negative and dismissed the plaintiff-appellant's action. On appeal –

Held:

(i) Ordinance No. 22 of 1866 enacted that the English Law is the Law of Partnership in Ceylon.

(ii) Section 27(1) of the Partnership Act of 1890, provides that where a partnership entered into for a fixed term is continued after the term has expired and without any express new Agreement, the rights and duties of the partners remains the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership. However this provision of the Partnership Act has to be read with section 18 of the Prevention of Frauds Ordinance, which states – for establishing a Partnership where the capital exceeds Rs. 1000/-, the Agreement should be in writing and signed by the party making same.

It appears that the parties carried on the same business on the same terms and conditions without entering into a fresh Agreement in writing; the partnership is therefore in law and in fact a partnership at will from 1.1.1991.

(iii) The Agreement No. 210 makes no mention of the capital of the partnership and therefore does not comply with the requirements of a partnership Agreement. The need to specify the capital of the partnership is of greater importance in view of the provisions of the Prevention of Frauds Ordinance. As the Agreement No. 210 is not in compliance with the Partnership Law, the plaintiff cannot pray

for the dissolution of a purported partnership at will, which he claims is an extension of an invalid partnership agreement from its very inception.

(iv) The value of the action stated in the plaint is for the purpose of stamp duty. It cannot be taken as the basis for concluding that the partnership capital exceeds Rs. 1000/-.

APPEAL from the Judgment of the District Court of Mt. Lavinia.

E. D. Wickremanayake for appellant.

S. Mahenthiran for respondent.

Cur. adv. vult.

November 8, 1996.

DR. RANARAJA, J.

The plaintiff instituted action against the defendants praying *inter alia*, for a **decree dissolving an alleged partnership at will**, to carry on the business called New Cheap Side from 01.01.91, and account. The defendants filed answer denying that a cause of action had arisen for the plaintiff to sue the defendants and praying for a dismissal of the action. When the matter was taken up for trial on 17.5.94, Court accepted a preliminary issue of law framed by the defendants counsel, to wit;

"As set out in paragraph 4 of the plaint, after the expiry of the agreement No. 210 of 31.12.1990, can the plaintiff have and maintain this action as presently constituted, since the parties have not entered into a fresh partnership agreement."

The plaintiff's counsel objected to the issue being framed in that form. An application to revise the order accepting the issue made to this Court is alleged to have been dismissed without costs. (vide para 21(b) of the petition of appeal).

Both parties tendered written submissions on the said preliminary issue. The learned District Judge by his Judgment dated 29.8.94, answered the issue in the negative and dismissed the plaintiff's action without costs. This appeal is from that Judgment.

The grounds of appeal stated in the petition *inter alia*, are, the learned Judge was in error, (a) when he took into account the value of the action given by the plaintiff as Rs. 100,000/- to determine the capital of the partnership business, (b) when he delivered his judgment on 10.10.94, which was a date fixed for further submissions.

At the commencement of proceedings on 17.5.94, the parties admitted that the plaintiff and the defendants entered into partnership agreement No. 210 dated 7.7.87, valid for a period of four years, created in the partnership agreement No. 172 dated 4th December 1986, which was to expire on 31.12.90. This action was filed on 16.9.91, that is, after the expiry of the said agreement.

To be entitled to the main relief claimed, namely, the dissolution of the partnership, the plaintiff had to prove that there was in existence a valid partnership between the plaintiff and the defendants at the time of instituting action.

The defendants have pleaded in their answer that after the expiry of agreement 210 on 31.12.90, the two defendants by agreement 762 dated 28.3.91, commenced a new partnership business with effect from 01.04.91, at the same premises, No. 386, Galle Road, Colombo 6. They cannot now in appeal, deny the validity of agreement 210 on the ground that it was a sham or intended to hide the true nature of the transaction.

Ordinance No. 22 of 1866 enacted that English Law is the Law of Partnership in Ceylon. Section 32(a) of the Partnership Act of 1890 provides;

“Subject to any agreement between partners, a partnership is dissolved—

- (a) If entered into for a fixed term, by the expiration of that term.
- (b) If entered into for a single adventure or undertaking by the termination of that adventure or undertaking.”

The duration of the partnership must always be stated in the agreement, if the creation of a partnership at will is to be avoided.

Section 27(1) of the Act provides;

"Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term so far as is consistent with the incidents of a partnership at will."

This provisions of the Partnership Act has however to be read with section 18 of the Prevention of Frauds Ordinance which states;

"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:-

(a)

(b)

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

Thus in the instant case, the plaintiff had to plead in his plaint before Court could proceed any further, that after the expiry of the agreement No. 210, (a) the partnership continued on the same terms and conditions set out there, (b) that the share capital was less than Rs. 1000/-.

In paragraph 3 of the plaint, the plaintiff has averred the said partnership business was accordingly carried on, on the terms and conditions of the said partnership agreement. Under the said partnership agreement a sum of Rs. 1500/- per mensem was payable to the plaintiff".

In paragraph 4 he states:

"After the expiration of the period provided in the said partnership agreement on 31st December 1990, the plaintiff and defendants carried on the same business on the same terms and conditions **without entering into a fresh agreement in writing**. The partnership is therefore in Law and in fact a partnership at will from 1st January 1991".

"It is important that the agreement records the capital required to be contributed by each partner and the proportions in which one's contribution is to be owned. **The capital should be expressed to be so much money;** and if one of the partners is to contribute lands or goods instead of money, such lands or goods should have a value set upon them and their value in money should be considered as his contribution".

"By capital of a partnership is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on a partnership business and intended to be risked by them in the business. The capital of a partnership is not therefore the same as its property: The capital is a sum fixed by the agreement of the partners. The amount of each partners' capital ought...always to be accurately stated, in order to avoid disputes on a final adjustment of account, and it is more important where the capitals of the partners are unequal, for if there is no evidence as to the amounts contributed by them, the shares of the whole assets will be treated as equal" – See Lindley and Banks on Partnership 16th Ed. Pg. 156 – 157, 422.

The agreement 210 makes no mention of the capital of the partnership and therefore does not comply with the requirements of a partnership agreement. The need to specify the capital of the partnership is of greater importance in this country, in view of the aforesaid provisions of the Prevention of Frauds Ordinance, which has been enacted to provide more effectually for the prevention of frauds and perjuries. The agreement 210 is not in compliance with

the partnership in Law. The plaintiff cannot therefore pray for the dissolution of a purported partnership at will, which he claims is an extension, of what is now clear, of an invalid partnership agreement from its very inception.

The plaintiff challenges the decision of the Judge to consider the value of the action stated in the plaint for the purpose of stamp duty as the basis for concluding that the partnership capital exceeded Rs. 1000/-. The plaintiff cannot adduce such an argument, when the burden of proving that the alleged partnership at will was in fact valid, although not in writing, as the capital was less than Rs. 1000/-, lay on him. Similarly, the plaintiff cannot claim that he had a right to an opportunity to lead oral evidence on the partnership capital, when the law requires the capital contributed by the partners to be recorded in the partnership agreement on which he endeavours to base the partnership at will. The plaintiff could not have surmounted this legal impediment, even if was allowed to tender further written submissions on 10.10.94, because those submissions which are filed of record, do not in any event, make reference to the legal requirement that a partnership agreement must record the capital contributed by the partners and the proportions, in which the contributed capital to be owned.

The Judgment of the learned District Judge is affirmed. The appeal is dismissed without costs.

Appeal dismissed.