SAMUEL GNANAM AND OTHERS
v
ISMAIL LEBBE

SUPREME COURT
JAYASINGHE, J.
DISSANAYAKE, J. AND
MARSOOF, J.
S.C. APPEAL NO. 9/2006
S.C. SPECIAL L.A. NO. 246/2005
C.A. NO. 950/94(F)
D.C. COLOMBO NO. 95342/MR
APRIL 26TH, 2006

Prevention of Frauds Ordinance – Interpretation of Section 18 – Partnership action – Manner in which partnership actions may be instituted in Sri Lanka.

The only question that emerged for determination in the Supreme Court was whether the action filed by some, but not all the partners of a partnership business can be had and maintained for the recovery of certain sums of money alleged to be due with regard to goods supplied in terms of a Distributor Agreement to which not all of the partners were signatories, despite the failure to produce the Partnership Agreement in evidence.

The Supreme Court granted special leave to appeal on the following two questions of law -

(a) Is the judgment of the Court of Appeal in respect of issue No. 7 in that whether in view of the Section 18 of the Prevention of Frauds Ordinance, the appellants can have and maintain the present action without tendering in evidence the written Partnership Agreement?

(b) Did the Court of Appeal fail to apply properly Section18 of the Prevention of Frauds Ordinance, in the circumstances of this case?

Held:

(1) The term 'capital' as used in Section 18 of the Prevention of Frauds Ordinance should be construed to mean the initial capital and not the fluctuating capital of a partnership at any given point of time.

The *onus* of establishing the amount of the initial capital lies on the party raising a plea based on Section 18 of the Prevention of Frauds Ordinance.

Per Saleem Marsoof, J.–

> "The learned District Judge was perfectly correct when he answered Issue No. 7 with the words: 'The Agreement is lawful.' It is patent that the Court of Appeal erred in assuming that the initial capital of the partnership in question exceeded one thousand rupees in the absence of any admission, or evidence to establish that fact, and failed to properly apply Section 18 of the Prevention of Frauds Ordinance in the circumstances of this case."

(2) Every partner is an agent of the firm and also for his other partners for the purpose of the business of the partnership, and the partners may sue on a contract entered into by one or more of the partners in the course of the partnership business.Though a partnership, unlike a company is not a distinct legal entity, the partners are entitled to sue third parties with whom any one or more partners had entered into a contract in the course of the partnership business.

Per Saleem Marsoof, J.–

> "..... the circumstances that this action had not been instituted by all the partners of the partnership firm does not affect the maintainability of the action, and no question of non-joinder or mis-joinder could arise – Objection of a technical nature such as non-joinder or mis-joinder of parties, are by their very nature best be taken up by way of motion prior to the commencement of the trial and should ideally not be raised as substantive issue at the trial."

Cases referred:

(1) *Pate* v *Pate*, 18 NLR 289.
(2) *Abeygunesekera* v *Mendis* 18 NLR 449.
(3) *Rajaratnam* v *Commissioner of Stamps* 39 NLR 481.
(4) *Idroos* v *Sheriff* 27 NLR 231,
(5) *Sivakumaran* v *Rajasekeram* 61 NLR 556.
(6) *Silva* v *Silva*, 5 C.W.R. 13.
(7) *Silva* v *Fernando*, 24 NLR 191.
(8) *Sinno* v *Punchihamy* 19 NLR 43
(9) *De Silva* v *De Silva* 37 NLR 276..
(10) *Aralias* v *Francis* 52 NLR 75.
(11) *Adlin Fernando and another* v. *Lionel Fernando and others* (1995) 2 SLR 25 at 27.

APPEAL from the judgment of the Court of Appeal.

Palitha Kumarasinghe, P.C. with *Nuwan Rupasinghe* for the plaintiff-respondents-appellants.

Jacob Joseph with *U.A. Mawjooth* for the defendant-appellant-respondent.

Cur.adv.vult

February 27, 2008

SALEEM MARSOOF, J.

The only question that arises for determination in this appeal is whether an action filed by some but not all, of the partners of a firm, for the recovery of certain sums of money alleged to be due with respect to goods supplied in terms of a Distributorship Agreement to which not all of them were signatories, can be had and maintained despite the failure to produce the relevant Partnership Agreement in evidence.

The plaintiff-respondents-appellants (hereinafter collectively referred to as the 'appellants') are admittedly partners carrying on business under the firm name of 'St. Anthony's Industries Group' which is a well-known manufacturer and supplier of PVC pipes, bolts & Nuts and other hardware items. The 1st, 2nd and 3rd plaintiffs-respondents-appellants, namely, Arulanandam Yosuvadian Samuel Gnanam, Arul Selvaraj Gunaseelam Gnanam and Rajaseelam Gnanam, are members of the famous 'Gnanam family' and the 4th plaintiff-respondent-appellant is the St. Anthony's Consolidated Ltd., which is a limited liability company incorporated under the now repealed Companies Act No. 17 of 1982 and having its principal place of business in Colombo. On 19th April 1983 the 1st, 2nd and 4th plaintiffs-respondents-appellants entered into a Distributorship Agreement ('P2'), a copy of which was produced with the plaint marked 'A', with the defendant-appellant-respondent, (hereinafter referred to as the 'respondent') who carried on business under the name, style and firm of 'Lanka Hardware Stores'. By the said Agreement, the said appellants agreed to supply to the respondent certain hardware items intended to be sold to dealers in terms of 'sales targets' to be fixed by the said appellants from time to time. By clause 3 of the said agreement, the respondent agreed to make regular and prompt payments for all goods accepted by him within a certain number of days, depending upon the type of item supplied.

Action was instituted in the District Court of Colombo by the Appellants for the recovery of a sum of Rs. 231,120.70 which was alleged to be the balance sum due from the respondent for goods said to have been supplied under the said Distributorship

Agreement as set out in the Statement of Accounts produced in evidence marked 'P3'. It may be observed that although in the Distributorship Agreement the names of the signatories thereof have been filled in as 'partners', in the plaint filed in the District Court, the 1st, 2nd and 4th plaintiffs-respondents-appellants are described as persons "Carrying on business under the name, style and firm of St. Anthony's Industries Group" and there is no averment clarifying whether the appellants instituted action as joint sellers or as partners. In his answer, the respondent denied that he entered into any Agreement with the appellants or that any cause of action has been disclosed in the plaint against him. He particularly averred that the 3rd plaintiff-respondent-appellant was not a party to the said Distributorship Agreement and that the appellants cannot have and maintain the action against him in view of mis-joinder of parties.

When the case was taken up for hearing in the District Court on 21st January 1993, it was admitted on behalf of the respondent that he signed the aforesaid Distributorship Agreement. Six issues were raised at the commencement of the trial, three by either party, and it appears from the issues raised on behalf of the respondent that his main defence was that the action cannot be had and maintained insofar as the 3rd plaintiff-respondent-appellant was not a party to the said Distributorship Agreement (issue 4) and the 4th plaintiff-respondent-appellant company was not duly incorporated (issue 5). The issues raised on behalf of the respondent are set out below:-

"4. පැමිණිල්ලේ කොටසක් ලෙස 'ඒ' ලෙස ලතුණු කොට ඇති ලියවිල්ලේ 3 වන පැමිණිලිකරු පාර්ශවකරුවෙකු වූයේ ද?

5. පැමිණිලි පත්‍රයේ 3 වන ඡේදයේ සඳහන් කොට ඇති ආකාරයට 4 වන පැමිණිලිකරු නිසි ලෙස සංස්ථාපනය කරන ලද සමාගමක් ද?

6. විත්තියේ ඉහත කී විසඳිය යුතු ප්‍රශ්න 4,5 විසඳිය යුතු ප්‍රශ්නවලට පිළිතුරු විත්තියේ වාසියට ලැබෙන්නේ නම් පැමිණිලිකරුට මෙම නඩුව පවරා පවත්වාගෙන යා හැකිද?"

Only one witness, namely Neelamani Deepthi Ponnamperuma, Credit Controller of St. Anthony's Industries Group, was called to give evidence on behalf of the Appellants. In her testimony she disclosed that the action has been instituted by the partners of a

firm carrying on business under the style, firm and name of "St. Anthony's Industries Group" and that at the time of the execution of the Distributorship Agreement in question the said partnership consisted of 5 partners whose names appear in the Certificate of Business Name produced by her marked 'P1'. Under cross-examination she admitted that although there were five partners at the relevant time, the said Agreement was signed only by 3 partners, and that the action has been instituted by 4 partners of whom one was not a signatory to the Distributorship Agreement. The learned Counsel for the respondent thereupon questioned the witness as to whether she was producing a copy of the relevant Partnership Agreement, and when she answered in the negative, he moved to raise the following issue which was duly accepted by Court without any objection from the learned Counsel for the appellants :-

"7. වංචා වැලැක්වීමේ පනත යටතේ හවුල්කරුවන්ගේ ගිවිස්නාව මෙම පැමිණිල්ල මගින් ඉදිරිපත් නොකොට මෙම පැමිණිල්ල පවරා පවත්වාගෙන යා හැකිද?"

The said issue has raised the question whether in view of Section 18 of the Prevention of Frauds Ordinance, Cap. 70 of the Revised Legislative Enactments of Ceylon (Official 1956 Edition), the Appellants can have and maintain this action without tendering in evidence the written Partnership Agreement.

After the appellants' case was closed, the respondent gave evidence and stated that although it is alleged in the plaint that he had entered into the Distributorship Agreement with the four appellants, he had in fact entered into the said Agreement only with three persons, namely the 1st, 2nd, and 4th plaintiffs-respondents-appellants. The essence of his case was that there was no cause of action on which the four persons named in the plaint could have sued him.

The District Court went onto deliver judgment in favour of the appellants as prayed for in the plaint answering all issues in their favour. The respondent appealed against the said judgment to the Court of Appeal, which by its judgment dated 29th September 2005 rejected the submissions made on his behalf in regard to issues 1 to 6, but held that the learned District Judge erred in answering

issue No. 7 in favour of the appellants. W.L.R. Silva,J. (with Chandra Ekanayake, J. concurring) observed as follows:-

> "In this case it is not the defendant-appellant who is seeking to establish a partnership. The plaintiffs-respondents who entered into the Agreement (P2) with the defendant-appellant *on the basis of a partnership* must prove that there was a valid partnership existing at the time the contract was entered into .... The learned District Judge has answered issue No. 7 in an awkward manner. His answer to the issue is: "The Agreement is lawful". This answer is certainly erroneous. It is not responsive to the issue raised. It is out of context and is not relevant. The lapse on the part of the plaintiff-respondents [present appellants] becomes more significant as the 3rd plaintiff-respondent [appellant] was not a party to the Agreement and not a juristic person either. The 3rd plaintiff-respondent [appellant] could have come to the case as one of the plaintiffs, only if the action was filed *on the basis of a partnership* .... For these reasons I am firmly of the view that the learned Judge should have answered issue No. 7 in the negative in favour of the appellant". (Square brackets and Italics are mine).

The 3rd plaintiff-respondent-appellant, who was not a party to the Distributorship Agreement, was Rajaseelan Gnanam, very much a natural person and a member of the Gnanam family, and W.L.R. Silva, J. in the above quoted passage was confusing the question whether the said appellant not being a signatory to the Distributorship Agreement can sue on that Agreement, with issue No. 5 raised in the original court as to whether St. Anthony's Consolidated Ltd., which was the 4th plaintiff-respondent-appellant, was duly incorporated. The latter issue had been considered by the learned District Judge to be irrelevant, and no submissions appear to have been made in that regard in the Court of Appeal. In fact, the Court of Appeal has held with the appellants on all matters raised before it except for Issue No. 7 raised on behalf of the respondent in the original court. This Court has granted special leave to appeal only on the following substantial questions of law:-

1. Is the said judgment of their Lordships of the Court of Appeal in respect of Issue No. 7 contrary to law?

2. Did the Lordships of the Court of Appeal fail to properly apply Section 18 of the Prevention of Frauds Ordinance, in the circumstances of this case?

The learned President's Counsel for the appellants submits that the decision of the Court of Appeal was based on an erroneous interpretation of Section 18 of the Prevention of Frauds Ordinance which provides as follows:-

> **"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 authorized by him or her, shall be of force or avail in law for any of the following purposes:-**
>
> **(a) for charging any person with the debt, default, or miscarriage of another;**
>
> **(b) for pledging movable property, unless the same shall have been actually delivered to the person to whom it is alleged to have been pledged;**
>
> **(c) for *establishing a partnership where the capital exceeds one thousand rupees*: 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 parol testimony concerning transactions by or the settlement of any account between partners."** (*Italics are mine*).

It is contended by the learned President's Counsel for the appellants, that appellants filed this action in the District Court to recover the balance amount due as price for goods supplied under a sale of goods transaction, and that the said action was not filed for "*establishing a partnership.*" He submits that the Court of Appeal failed to properly consider the fact that the case was instituted on the basis of the Distributorship Agreement marked 'P2' in terms of Section 48 of the Sale of Goods Ordinance. He submits that this was a money recovery action and not a partnership action which would have entailed the establishment of a partnership.

The learned Counsel for the respondent, however, submits that this is not a simple money recovery action because the 3rd plaintiff-

Appellant-appellant was not a signatory to the Distributorship Agreement and stressed that he could have come into the case as an appellant only if the action has been instituted on the basis of a partnership. The learned Counsel for the respondent submitted that in terms of Section 18 of the Prevention of Frauds Ordinance, the appellants have to establish the existence of a partnership to obtain relief as prayed for in the plaint. He relied on the decision of the Privy Council in *Pate* v *Pate*(1) in which,it was observed by Lord Sumner at 291 that "it could hardly be doubted that "establishing" means "establishing by proof" *coram judice*". Therefore, he submitted, that the appellants cannot succeed without producing in evidence the relevant Partnership Agreement. He relied on the decision in *Abeygunesekera* v *Mendis*(2), in which the Supreme Court held that the admission in the answer of the existence of the partnership by a defendant does not prevent him from setting up by way of defence the Prevention of Frauds Ordinance, where the agreement is not in writing and the capital exceeds one thousand rupees. He also relied on the decisions in *Rajaratnam* v *Commissioner of Stamps*(3), *Idroos* v *Sheriff*(4) and *Sivakumaran* v *Rajasekeram*(5). In the latter case, the Privy Council held that in the absence of an agreement in writing as required by Section 18(c) of the Prevention of Frauds Ordinance, the action was not maintainable.

As against the above authorities, the learned Counsel for the appellants has cited the decisions in *Silva* v *Silva*(6) and *Silva* v *Fernando*(7) to show that partnership need not be established when partnership is only incidental to the case. He also placed reliance on the following passage from Dr. C.G. Weeramantry's monumental work "*The Law of Contract*" Vol. 1 page 210:-

> "Writing is required only in cases where the plaintiff seeks to establish a partnership so far as the defendant is concerned. Where therefore evidence of the fact of partnership is purely incidental to the claim and is sought to be laid as part. of the *res gestae*, there is nothing in the Ordinance which prevents such evidence being led although the partnership is not in writing. Where for example persons carrying on business in partnership sue their servant for the recovery of a sum of money due from him, or where action is brought to enforce a

trust in respect of land purchased in the name of one partner out of moneys belonging to the partnership it is not essential to the plaintiff's claim as against the defendant that a partnership be established. Evidence of the partnership is in such an instance only a part of the history of the case and will be permitted."

I am, however, inclined to agree with the submission of the learned Counsel for the respondent that evidence of the partnership is not merely a part of the *res gestae* and is an integral part of the cause of action sued upon. Although the plaint filed in this case does not disclose whether the cause of action pleaded therein is alleged to have arisen jointly, severally or jointly and severally, and the prayers to the plaint do not shed any light in regard to this matter, the 3rd plaintiff-respondent-appellant who is not a signatory to the Distributorship Agreement,could have come into the case with the other appellants only on the basis that he is a partner in the firm, and for this purpose it is necessary to "establish" a partnership. The proviso to Section 18 of the Prevention of Frauds Ordinance which expressly lays down that the requirement of Section 18 should 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, does not extend to a situation such as that arising in this case where partners or persons acting as such are seeking to sue a third party on the basis of the existence of a partnership. I am therefore of the view that the appellants cannot succeed without proving the partnership which is alleged to bind the appellants together.

Witness Neelamani Deepthi Ponnamperuma has testified before the original court to the effect that the 1st to 4th plaintiff-respondent-appellants, along with one other person, were carrying on business under the firm name 'St. Anthony's Industries Group' at the time the relevant Distributorship Agreement was signed with the respondent in 1983. While this testimony has not been contradicted by the respondent, the only objection raised to the maintainability of the action is the non-production of the written Partnership Agreement alleged to have been entered into by the said partners. It is this objection that has got crystallized as Issue No. 7. It has

been submitted on behalf of the respondent that in view of Section 18 of the Prevention of Frauds Ordinance, *parol* evidence of the existence of the partnership cannot be led, and that it is essential to produce in evidence the written Partnership Agreement, if any.

Learned President's Counsel for the appellants has strenuously argued that a written partnership agreement is required under Section 18 of the Prevention of Frauds Ordinance only where the *initial* capital of the partnership exceeded thousand rupees, and that the onus of proving that the capital exceeded this amount is on the party relying on this provision. For these propositions, he relies on the decisions of this court in *Sinno* v *Punchihamy*[8] and *De Silva* v *De Silva*[9]. In the first of these cases it was held that the term 'capital' refers to the initial capital and not to the amount that may stand as capital, after additions or withdrawals at any time during the course of business. This decision was followed in *Aralias* v *Francis*[10] where the defendant who pleaded Section 18 in defence had failed to produce cogent evidence that the initial capital of the partnership exceeded one thousand rupees. Gunasekara, J. in the process of setting aside the judgment of the lower court upholding the plea, observed as follows at 77:-

> ".... the language of the judgment suggests an assumption that the burden lay on the plaintiff to prove that the capital of the partnership was less than Rs. 1,000. Not only does the burden on this issue lie on the defendant but that burden is, in the language of Sir Thomas de Sampayo in *Sinno* v *Punchihamy (supra),* a heavy one and in the words of the same distinguished Judge, "the defendant, having admitted the partnership, the Court will exact from him the most strict proof of any facts on which he may rely as entitling him to take refuge under the Ordinance."

There can be no doubt that the term 'capital' as used in Section 18 should be construed to mean the initial capital and not the fluctuating capital of a partnership at any given point of time, and that the *onus* of establishing the amount of the initial capital lies on the party raising a plea based on Section 18 of the Prevention of Frauds Ordinance. In the instant case, there was no admission or

issue in regard to the amount of the initial capital of the partnership, and absolutely no evidence had been led in regard to the amounts that the partners had contributed as the initial capital. In the circumstances, the learned District Judge was perfectly right when he answered Issue No. 7 with the words: "The Agreement is lawful." It is patent that the Court of Appeal erred in assuming that the initial capital of the partnership in question exceeded one thousand rupees in the absence of any admission, or evidence to establish that fact, and failed to properly apply Section 18 of the Prevention of Frauds Ordinance in the circumstances of this case.

Before parting with this judgment, it is necessary to advert to two other matters which, though not strictly arising in this appeal, were taken up in the course of the submissions of learned Counsel. The first of these relates to the manner in which partnership actions may be instituted in Sri Lanka, and the second relates to the practice of technical objections such as mis-joinder and non-joinder of parties being taken up as issues for determination at a civil trial.

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the partners may sue on a contract entered into by one or more of the partners in the course of the partnership business. While a partnership, unlike a company, is not a distinct legal entity, the partners are entitled to sue third parties with whom any one or more partners had entered into a contract in the course of the partnership business. When instituting such action, all the partners have to be named in their proper names as plaintiffs. In England, Order 81 has simplified the procedure by permitting the action to be filed in the firm name. In Sri Lanka, in the absence of such a provision, the action has to be filed in the names of all the partners as plaintiffs. However, as pointed out by Lindley and Banks on "Partnership" 17th Edition, page 444, "a failure to join one or more of them will not itself be fatal." Therefore, the circumstance that this action had not been instituted by all the partners of the partnership firm does not affect the maintainability of the action, and no question of non-joinder or mis-joinder could arise. In terms of section 11 of the Civil Procedure Code, Cap 101 of the Revised Legislative Enactment of Ceylon (Official 1956 Edition), all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist,

whether jointly, severally, or in the alternative, in respect of the same cause of action, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to without any amendment of the plaint for that purpose. The question whether the cause of action upon which the appellants instituted this action was joint, several or joint and several has not been raised in appeal, and I therefore refrain from expressing my views on this aspect of the case.

Regarding the second matter, it is necessary to stress that as observed in *Adlin Fernando and another* v *Lionel Fernando and others* (11), objections of a technical nature such as non-joinder or mis-joinder of parties, are by their very nature best taken up by way of motion prior to the commencement of the trial and should ideally not be raised as substantive issues at the trial.

For the foregoing reasons, I make order setting aside the judgment of the Court of Appeal and affirming the judgment of the learned District Judge. I make no order as to costs in all the circumstances of this case.

JAYASINGHE, J. - I agree.

DISSANAYAKE, J. - I agree.

Appeal allowed.
Judgment of the District Court upheld.