1954 *Present :* Gunasekara, J., and Fernando, A.J.

P. KANDASAMY, Appellant, *and* S. R. KANDIAH *et al.*, Respondents

S. C. 53—D. C. Jaffna, 5,896/M

Contract—Prohibitory statute—Illegality—Construction—Excise Ordinance (Cap. 42) —Sections 17, 24, 43, 45.

Where an agreement does not expressly contemplate the commission of a breach of any statutory provision, it can be held to be unlawful only if its performance would necessarily involve such a breach or if extrinsic evidence indicates the intention or the need to commit such a breach.

The 1st and 2nd defendants who possessed exclusive and non-transferable licences for the sale of arrack entered into an agreement of " partnership " with the plaintiff and the 3rd defendant. The agreement did not envisage that any one but the actual licensees would be responsible for the sale of arrack at taverns, and the object of the partnership was only to contribute capital and to share the profits and losses. When the plaintiff sued for an accounting and to recover his share of the profits, the trial Judge dismissed the action on the preliminary issue that the agreement was illegal and contrary to public policy and could not therefore be enforced.

Held, that the contract did not contravene any relevant provision of the Excise Ordinance and was not illegal.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, Q.C., with *C. Chellappah* and *Sivagurunathan*, for the plaintiff appellant.

S. Nadesan, Q.C., with *S. Sharvananda*, for the 1st defendant respondent.

Cur. adv. vult.

September 28, 1954. FERNANDO, A.J.—

The 1st defendant in this action was the holder of the exclusive privilege (granted under the Excise Ordinance) of selling arrack by retail in taverns in a certain area during the period October 1948 to September 1949, and the 2nd defendant was the holder of a similar privilege in respect of taverns in certain other areas for the same period. The conditions for the exercise of the privilege which are laid down by virtue of powers conferred by s. 24 of the Ordinance, include the following :—*Non transferability of Licence.* Manager to be approved. No privilege of manufacture, supply or sale or any interest therein shall be sold, transferred or sub-rented without the Government Agent's previous permission nor if the G. A. so orders, shall any agent be appointed for the management of any such privilege without his previous approval.

Shortly after the privilege had been granted, those two defendants and the plaintiff and 3rd defendant entered into an agreement which commenced with a recital that the 1st and 2nd defendants " having taken " the plaintiff and 3rd defendant " as partners shareholders *we are desirous of carrying on the said business of purchase and sale of arrack* with a capital of Rs. 120,000/- ", and that each party would contribute a specified part of the amount.

The agreement itself contains provisions which are substantially as follows :—

(1) that each party would have certain shares (proportionate to his contribution of capital)

(2) that moneys already deposited with the Government as security for certain purposes connected with the privileges would be regarded as being contributed by the parties according to their respective shares and that when the deposits became due for refund they would be divided proportionately between the parties ;

(3) *that the 1st defendant and the 2nd defendant shall carry on and manage the said business* and deposit monthly money due for arrack purchased (from the Government) and pay for all expenses ;

(4) *that the 1st defendant and 2nd defendant shall keep proper accounts* which shall be in the custody of the 1st defendant, and that moneys not actually required for the business shall be in the custody of the 1st defendant ;

(5) that the parties shall meet monthly and ascertain the correctness of the accounts, and that profits or losses shall be paid or borne proportionately every six months ;

(6) that additional capital if required shall be contributed proportionately.

The plaint in this action recites that the 1st defendant and the 2nd defendant were the holders of the privileges and that the 1st defendant and the 2nd defendant agreed to take the other two parties as partners and to share the profits in the specified proportions, and the plaintiff sues for an accounting and to recover his share of the profits for the period. The learned District Judge has dismissed the action on the preliminary issue that the agreement was illegal and contrary to public policy and cannot therefore be enforced.

The provisions of law relevant to the determination of the preliminary issue are condition 13 which has already been set out, as well as S. 17 of the Ordinance (which prohibits the sale of an excisable article without a licence), S. 43 (which declares a person who sells an excisable article in contravention of the Ordinance to be guilty of an offence), and S. 45 (which renders a breach of a condition an offence).

" The question whether a particular transaction comes within the meaning of a prohibitory statute is manifestly one of construction. We have in each case to ask, does the Act mean to forbid this agreement or not ? And in each case, the language of the particular Act must be considered on its own footing." (*Pollock, Principles of Contract, 13th Ed. p. 274*). The learned author cites in this connection a dictum of Field J. (*4 Q. B. D. at p. 224*) :— " Before we can make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it be so."

The two questions we have to decide in this case are, what is the nature and effect of the agreement entered into between the parties, and did the Legislature intend to prohibit and render unlawful an agreement of such a nature and effect ?

With respect to the first of these questions, Mr. Nadesan (for the respondents) contended that the effect of the agreement was to constitute a partnership having as its object the carrying on of the business which was the subject of the exclusive privileges. He maintained that all the assets of the business including arrack purchased for the purposes of sale would be the property, not of the 1st or 2nd defendant, but of the partnership, and would be treated as such in the event of a dissolution, that the sales of arrack at each tavern must be held to be sales, not by the holder of the appropriate privilege in respect of the tavern, but by the four partners, and that each of them who did not actually hold the appropriate privilege would be contravening the prohibition of unlicensed sale. Mr. Nadesan relied in this connection on the principle that partners are the agents of each other and that each would therefore be responsible for the acts of the others. In this view the object of the agreement was to vest in the partnership the rights conferred by the exclusive privileges granted to the 1st and 2nd defendants, an object prohibited by Condition 13 and in addition contrary to the policy of the Ordinance forbidding sales of arrack by unlicensed persons. He further contended that at the least the agreement was contrary to Condition 13 in that it purported to transfer to unauthorised persons an *interest in the exclusive privileges.*

Mr. Perera argued that the object of the agreement was nothing more than the contribution of capital, and the sharing in the profits or losses, of the business which the 1st and 2nd defendants respectively were entitled to carry on by virtue of the privileges they had secured. He pointed to the fact that the operative clauses expressly preserve to those defendants the right and the duty to carry on the business of the purchase and sale of arrack and do not authorise the other parties to carry on or manage the business ; in addition to that, they merely effect an arrangement for the financing of the business and for the sharing of profits and losses in proportion to the sums contributed by each of the parties. Mr. Perera also argued that the agreement does not purport to relieve the 1st and 2nd defendants of any of the responsibility attaching to them as holders of the privileges, and that despite the agreement they would remain answerable to the Government for the due observance of the conditions governing the exercise of the privilege. There being nothing in the operative clauses which contemplated any breach of the Excise law or which effected a transfer prohibited by the relevant condition, the mere expression in the recitals *of a desire to carry on the business as partners* cannot, he said, be construed as indicating that such was the real object of the agreement.

Considering the matter apart from authority I am much inclined to the view put forward by Mr. Perera. Where an agreement does not expressly contemplate the commission of a breach of any statutory provision, it can be held to be unlawful only if its performance would necessarily involve such a breach or if extrinsic evidence indicates the intention or the need to commit such a breach ; and where on the face of the agreement it appears that performance is possible, either in a lawful manner or else in an unlawful manner, it should be assumed until the contrary is shown that the parties contemplated a lawful means of performance.

In the present case, even without such an assumption, the better construction of the agreement is that the 1st and 2nd defendants were to carry on and manage the respective businesses authorised by the privileges granted to them and that " the partners " as such had no concern in the businesses, but were " interested " in the lay sense of that term in that they contributed capital and were to share the profits or losses. I can see nothing strange in an arrangement whereby a number of persons become " interested " in that sense in a venture to be carried on solely by one of their number or even by a person who is not himself a partner. The object of the partnership would not then be to carry on the venture, but to finance the actual operator and to recover or bear the profits made or losses incurred by the operator.

Chief Justice Wood-Renton, in his dissenting judgment in *Fernando v. Ramanathan* [1], was of opinion that an agreement, in many respects similar to the one before us, constituted a partnership to carry on the business of selling opium, and found support in the earlier decision in *Meyappa Chetty v. Ramanathan* [2] and in certain Indian cases, including *Padmanabhan v. Sarda* [3]. The learned Chief Justice was of opinion that " each partner " was engaged in " selling " opium, whether he did so directly or through the agency " of a co-partner ". This opinion involves also the view that each partner would be selling opium without a licence, in contravention of the Opium Ordinance. If that be so, then, in a case like that before us, an " unlicensed " partner could have been convicted of selling arrack without a licence even though the physical transaction of sale was actually carried out at the tavern by another partner who held the privilege in respect of that tavern. We have had on this point the advantage of considering an argument which was not apparently adduced in the earlier cases. Mr. Perera contends that the principle that a partner is liable for the acts of his co-partners, as also the general principle of liability for the acts of an agent, applies purely for the purposes of the civil law and cannot be availed of in order to impute penal liability. To take, for example, s. 123 (1) (*a*) of the Motor Traffic Act, will an owner be guilty of the offence of *driving* a motor vehicle without a licence if in fact his vehicle is driven by an unlicensed driver? It is evident that the *Legislature did not contemplate any such vicarious liability for the act of driving*, since it proceeds immediately to make it an offence for a person to *employ* an unlicensed person to drive a vehicle. There are numerous instances in our statute law where employers and owners can be punished for contravention committed by their agents, but in all of them the vicarious liability attaches by reason of explicit provision in that behalf and not of the application of any implicit principle. With very great respect I take the view that since the agreement under consideration does not envisage that any one but the holder of the appropriate privilege would be responsible for the sales of arrack at taverns, neither the parties nor any "unlicensed " partner could have been convicted of selling arrack without a licence. Ennis J. (who wrote one of the majority judgments in *Fernando v. Ramanathan* (*supra*)) said at p. 351, " Nothing in the terms of the Ordinance or in the conditions of the licence prohibit, in my opinion, a person

[1] *(1913) 16 N. L. R. 337.* [2] *(1913) 16 N. L. R. 33.*
[3] *35 Madras 582.*

carrying on the business of selling opium through persons duly licensed to sell; and the object of the Ordinance, which is to control the possession and sale of opium, would, it seems to me, be attained without extending the prohibition on sale contained in S. 6 to the partners in a business carried on through duly licensed persons who have the control and management of the shops." Even therefore on the assumption that the agreement in the present case constituted a partnership to carry on the business of selling arrack it would not involve a contravention of the Excise Ordinance.

As to the principal question, namely the nature and effect of the agreement, I would adopt with respect the opinion of Pereira J. in the same case (at p. 349). "Clearly, the duties and liabilities of the licensees with respect to their own respective licences remain untouched. The agreement is no more than one to pool the profits, and there is no stipulation whatever allowing or requiring a partner to do anything forbidden by the Ordinance. That is the most important feature of the agreement." I accordingly hold that here too the object of the partnership was to contribute capital and to share the profits and losses, but not to carry on the business of selling arrack.

Mr. Nadesan made one further submission, namely that this case must be distinguished from that of *Fernando v. Ramanathan* (supra) in that in the latter case there was no condition which prohibited the transfer of the privilege or of any interest therein. In fact Ennis J. refers to this feature in attempting to distinguish one of the Indian cases where the agreement in question had been held to be unlawful. This submission would be decisive *only if it can be held that the partnership agreement constitutes a transfer of the privilege of sale or of an interest therein*, and that the 1st and 2nd defendants have by entering into the agreement committed a breach of the relevant condition punishable under s. 45 of the Ordinance. There would be such a breach if they purported to assign to the partnership an interest in the right of selling arrack in the taverns, but as I have already indicated, the agreement left unimpaired the exclusive rights granted to them and only created an interest in the profits derived by them through the exercise of those rights. The Legislature has nowhere in the Ordinance or in the prescribed conditions attempted to regulate such matters as the source from which the holder of the privilege obtains funds in order to carry on the undertakings or the destination of the profits gained from the undertakings; and an agreement with respect to such matters cannot be construed as falling with the class of transactions discouraged by the relevant condition unless it in addition purports to create an interest in the management and control of the business authorised by the privilege.

For these reasons, I would set aside the decree entered by the learned District Judge, and remit the case for trial on the basis that the agreement was valid and enforceable. The appeal is allowed with costs. The costs of the proceedings in the District Court will be costs in the cause.

GUNASEKARA, J.—I agree

Appeal allowed.