

1961 Present : H. N. G. Fernando, J. and L. B. de Silva, J.

E. B. W. C. MOHOTTI, Appellant, and K. A. GUNAWARDENA  
Respondent

S. C. 645/58—D. C. Ratnapura, 1798

*Partnership—Capital over Rs. 1,000—Absence of written agreement—Admissibility of parol evidence—Prevention of Frauds Ordinance, s. 13 (c).*

M was the sole owner of a business from 1932 to 1950. The defendant was employed by M in 1946 as the manager of the business and was admitted as a *de facto* partner from April 1950. He did not contribute any capital but, in lieu of capital, he contributed his managerial skill and acumen for the conduct of the business. Although the capital of the partnership was over Rs. 1000, there was no written agreement signed by the parties to satisfy the requirements of section 18 (c) of the Prevention of Frauds Ordinance. In the present action the plaintiff as executor of the estate of M sued the defendant for a declaration of title to and recovery of the possession of the business.

*Held*, that the defendant was entitled to lead parol evidence to prove that the relationship between him and the deceased M was one of partnership and that in consequence of the absence of any written agreement the plaintiff could not maintain the action.

**A**PPEAL from a judgment of the District Court, Ratnapura.

*H. V. Perera, Q.C.*, with *L. G. Weeramantry* and *N. R. M. Daluwatte*,  
for the Plaintiff Appellant.

*H. W. Jayawardena, Q.C.*, with *G. D. C. Weerasinghe* and *C. P. Fernando*, for the Defendant-Respondent.

*Cur. adv. vult.*

December 15, 1961. L. B. DE SILVA, J.—

The plaintiff as executor of the Estate of S. W. C. Mohottihamu sues the defendant for a declaration of title to and recovery of the possession of the business referred to in paragraph 2 of the plaint. The defendant alleged that Mohottihamu and he carried on this business in partnership in equal shares and that the initial capital of the partnership business was over Rs. 1000. He maintained that the plaintiff could not maintain this action as the contract of partnership was not in writing as required by section 18 of the Prevention of Frauds Ordinance, Chapter 57 of the Legislative Enactments.

The learned District Judge held that Mohottihamu started this business in 1932 and continued to be the sole owner thereof till the end of March, 1950. The defendant was employed by Mohottihamu

as the manager of this business in 1946 and he was admitted as a *de facto* partner from 1/4/1950 in equal shares as evidenced by the document D1. The defendant alleged in his answer and evidence that the partnership commenced in October, 1946 but this was not accepted by the learned District Judge. The Judge further held that the capital of the partnership was over Rs. 1000 whether the partnership commenced in October 1946 or on 1st April, 1950.

The findings of fact by the learned District Judge have not been canvassed in this appeal. The learned District Judge held that the partnership cannot be established in view of the provisions of section 18 of the Prevention of Frauds Ordinance and dismissed plaintiff's action on that ground.

The relevant provision of this Ordinance is section 18 (c) 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 :—

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

The proviso to this sub-section is not relevant to this case.

There was no written agreement signed by the parties to satisfy the requirements of this section. The learned Queen's Counsel for the Appellant argued that the deceased Mohottihamu was the sole owner of this business prior to the coming into existence of the ' *de facto* ' partnership and as there was no written promise, contract, bargain or agreement as required by this section, the deceased continued to be the sole owner of this business and that the defendant could not in law claim to be a partner of this business or seek to establish the ' *de facto* ' partnership.

Though this argument appears to be attractive, the real question that the Court has to decide in this case is this—“ Who is seeking to establish the partnership for the purpose of enforcing his legal rights? ”. The true position is that there was in fact a partnership in existence at the time Mohottihamu died and the plaintiff is seeking a declaration of title to the business of the ' *de facto* ' partnership and possession of that business.

The business that was in existence at the time of the death of Mohottihamu when this action was filed, was clearly not the business that existed before the ' *de facto* ' partnership was established on 1st April 1950. The original business may very well have developed and expanded as a result of the activities of the ' *de facto* ' partnership or it may even have fallen on evil days. The fact that the defendant did not contribute any

capital when the partnership was established is immaterial. In lieu of capital, the defendant has contributed his managerial skill and acumen for the conduct of the business.

In these circumstances, is it open to the plaintiff to base her claim on false premises by stating that the business solely belonged to the deceased Mohottihamu at the time the cause of action arose when in fact it did not and that the defendant was only the manager of the business under Mohottihamu when the defendant was in fact his business partner? If she had stated the truth in her plaint, clearly her claim could not have been maintainable as the agreement to establish the partnership was of no force or avail in law.

In *Balasubramaniam v. Valliappar Chettiar*<sup>1</sup>, it was held that in an action brought by the Executor of a deceased person to recover money on the basis of a gratuitous agency between the deceased and the defendant, the defendant is not precluded by section 21 (now 18 (c)) from leading parol evidence of a partnership, in contravention of the section in order to exclude the plaintiff's claim. In his judgment, Keuneman, J., at page 558, stated as follows:—

“The present case stands on an entirely different footing. The plaintiff alleges that there was a gratuitous agency on the part of defendant in relationship to Pillai. The defendant seeks to rebut that allegation, and to prove that the relationship between these persons was one of partnership, but that in consequence of the absence of any written agreement, that relationship was of no force or avail at law, and that the plaintiff cannot maintain this action. The defendant cannot be said to found his case on the allegation of partnership, nor to make parol evidence the basis of his suit. On the contrary his allegation is that the relationship between the parties was such that it was of no force or avail at law. If a defendant in this position were not allowed to give such evidence, a ready means would be available for a dishonest plaintiff so to frame his action as to escape the effect of section 21.”

I am unable to distinguish the claim of the present plaintiff-appellant from that of the plaintiff-respondent in *Balasubramaniam v. Valliappar Chettiar*. In the present case, I am quite satisfied that the plaintiff-respondent has dishonestly framed her action in an attempt to escape the effect of section 18 (c) of the Prevention of Frauds Ordinance. I hold that she is not entitled to succeed in this action by such a course. I accordingly dismiss the appeal of the plaintiff with costs.

H. N. G. FERNANDO, J.—I agree.

*Appeal dismissed.*

<sup>1</sup> (1938) 39 N. L. R. 553.