

(1963) 01 MAD CK 0012

In the Madras High Court

Case No : Letters Patent Appeal No. 78 of 1959

A.V. Varadarajulu Naidu (decd.) and Others

APPELLANT

Vs

K.V. Thavasi Nadar

RESPONDENT

Date of Decision : 03-01-1963

Acts Referred:

Contract Act, 1872 — Section 124, 126, 128
Motor Vehicles Act, 1988 — Section 42(1), 59(1)
Partnership Act, 1932 — Section 4
Specific Relief Act, 1877 — Section 41

Citation : AIR 1963 Mad 413 : (1963) ILR (Mad) 942

Hon'ble Judges : Ramakrishnan, J;Kunhamed Kutti, J

Bench : Division Bench

Advocate : R. Ramamurthi Iyer, for V. Ratnam, for the Appellant; V. Thiagarajan, for T.V. Balakrishnan, for the Respondent

Final Decision : Allowed

Judgement

Ramakrishnan, J.—This Letters Patent Appeal is filed against the judgment of Basheer Ahmed Sayeed, J., in App. 7 of 1956 which in its

turn was an appeal from the judgment and decree passed by the learned Principal Subordinate Judge of Chingleput in O. S. No. 39 of 1954. The

suit was filed on a promissory note for recovery of a sum of Rs. 5641-10-0. The plaint allegations are succinctly set out in paragraph 2 of the trial

Court's judgment, as follows:

The plaintiff's case is: He entered into a partnership trade in lorry service with the second defendant and carried on the business under the name

and style of ""Magiszchi Lorry service"". Differences arose between them and the plaintiff wanted to retire from the partnership. In a mediation, it

was settled that he second defendant should take over the business with all

assets and liabilities and that Rs. 5000/- should be given to the plaintiff in full quit of his share and claims. Defendants 1, 3 and 4 proposed to continue the business in partnership. Therefore, they also undertook to pay the said sum and consequently, all the defendants executed a promote for Rs. 5000/- on 5-6-1953 agreeing to repay the same on demand with interest at 12 per cent per annum. On their failure to pay the amount in spite of demands, the plaintiff sent notices to which they sent replies making false allegations that they were only sureties for the safe upkeep of the lorry by the second defendant and that they did not execute the promote undertaking to pay the liability. These allegations are unsustainable and false. The suit is therefore laid for recovery of the amount. Neither Act IV of 1938, nor Act V of 1954 has application as all the defendants are Income Tax as-eessees and they did not also possess agricultural lands. The four defendants filed separate written statements, but their pleas were substantially identical. They alleged that the partnership agreement between the plaintiff and the second defendant in respect of the lorry service was illegal and void as being opposed to public policy, and in contravention of mandatory provisions of the Motor Vehicles Act. The suit claim arose out of the settlement of the abovementioned partnership. Defendants I, 3 and 4 joined in the execution of the promissory note on the understanding that they were sureties only for ensuring safe custody of the lorry by the second defendant. Therefore the plaintiff cannot have any recourse to them. The lorry was kept intact by the second defendant, and no claim could be enforced against defendants I, 3 and 4, as the disposal of the lorry was a condition precedent to the enforcement of the promissory note. Defendants I and 3 claimed that they were agriculturists and claim that the suit was not maintainable during the period when the proceedings were stayed under Act V of 1954.

2. The trial Court found that the partnership agreement between the plaintiff and the second defendant was an illegal partnership, as it contravened the provisions of the Motor Vehicles Act, The suit promissory note, which was executed in pursuance of the settlement of the accounts of the partnership, was illegal and unenforceable. It found that defendants 1, 3 and 4 joined in the execution of the promissory note as sureties for the payment of the debt by the second defendant, and negatived their contentions

that they were sureties only for the safe, custody of the lorry. But since it was found that the liability against the principal was one which could not be enforced, the claim could not also be enforced against the sureties. The other contentions of the defendants were negatived.

3. The plaintiff took up the case in appeal before Basheer Ahmed Sayeed, J. The learned Judge found, on a consideration of the evidence in the case, that the suit was one for the recovery of the amount paid by the plaintiff to second defendant for the purchase of a lorry, and it was this amount which the second defendant along with the other three defendants undertook to repay by means of the suit promissory note. The plaintiff was in the position of financing creditor, who advanced moneys to the second defendant for the purchase of a lorry and for the plying of the same, which was completely and throughout under the control and management of the second defendant. The plaintiff merely received a share of the earnings made by the lorry. The suit was only for the recovery of the money due on a promissory note, which represented the amount paid by the plaintiff for the purchase of the lorry, to the second defendant. Therefore the suit promote was not tainted by illegality or validity, on any of the grounds urged by the defendants. The learned Judge also found that, even if the partnership was void, in the interests of justice plaintiff would be entitled to get back the amount, which he advanced to the second defendant. The learned Judge found that defendants I, 3 and 4 were sureties, for the payment of the debt by the second defendant. He found also that, in any event, even if the contract out of which the suit promissory note came into existence, was void or illegal, the defendants I, 3 and 4 as sureties would be liable to pay the amount to the plaintiff. A decree was, therefore, passed in favour of the plaintiff for the suit amount.

4. The present Letters Patent Appeal is filed by the defendants I to 4 from the above decision. After the filing of the appeal, the first appellant died and his legal representatives were brought on record.

5. All the points which Basheer Ahmed Sayeed, J., found in favour of the plaintiff for the granting of the decree were attacked by Sri Rama-murthi Iyer, learned counsel, who appeared for the appellants before us. We have to consider the following three points for decision:

1. Whether the suit claim arose out of the settlement of the accounts of a

partnership, which was illegal and opposed to public policy, and consequently is the suit claim not enforceable?

2. In any event, will the plaintiff be entitled to get back the amount advanced by him, even if the partnership agreement with the second defendant, is found to be void?

3. On the concurrent findings of both the Courts, that the second defendant was the principal debtor on the suit promissory note and defendants I,

3 and 4 were only sureties for payment of the debt, can the plaintiff enforce his liabilities against defendants I, 3 and 4, in the event of the liability of

the second defendant becoming unenforceable, for the reasons above mentioned?

6. Point I: The plaintiff, in his plaint, has specifically averred that he and the second defendant were carrying on partnership business in lorry service

under the name and style of ""Magiz-chi Lorry service"", that on account of differences between them as the plaintiff wanted to retire from the

business and dissolve the partnership, there was a mediation by panchayatdars between the plaintiff and the second defendant, and in such a

mediation, it was agreed that the second defendant should take over the business with all its assets and liabilities, and that a sum of Rs. 5000/-

should be paid to the plaintiff in full quit of his share in the business. This position is reiterated in paragraph 4 of the plaint; and again in paragraph 6

of the plaint, it is confirmed that, after the defendants 1, 3 and 4 had agreed to stand surety, the plaintiff consented to receive Rs. 5000/- for his

share in the partnership business. The plaintiff, in his evidence, as P. W. I, deposed that for the above mentioned lorry service, he (the plaintiff) had

invested a capital of Rs. 5000/- and that the defendant was merely a working partner. They then purchased a second hand lorry out of the Rs.

5000/- given by the plaintiff. A route permit was obtained in the second defendant's name for the partnership. Accounts were opened and the

second defendant maintained the accounts. These accounts were filed into Court. Each of the partners was entitled to a half share in the business.

In the presence of three mediators, it was proposed to settle the account of the partnership, as the plaintiff decided to stop his connection with the

business, because the defendant was not properly bringing into account the receipt or the income. When the mediators looked into the accounts,

they found Rs. 6000/- and odd to the credit of the plaintiff. They asked the

plaintiff to give up the profits and take only Rs. 5000/- invested by him and asked the second defendant to pay the amount to the plaintiff and take the lorry. Both the plaintiff and the second defendant accepted the decision of the panchayatdars. In his examination-in-chief itself, the plaintiff deposed that before the mediators, accounts of the partnership were settled and the settlement was entered in the account books and the plaintiff signed on one page and the second, defendant on another page. The Accountant wrote the entries, and then Ramanujam Pillai, P. W. 2, wrote the suit promissory note. In cross-examination, the plaintiff added:

The assets and liabilities were taken into account and the price (of the lorry) was fixed at Rs. 10,000/-. The debts outstanding were Rs. 3000/-.

To me Rs. 5000/- had to be paid. For the services rendered by defendant 2, he was to be given Rs. 2000/-. The said arrangement was oral.

These facts are further supported by the following recital in the promissory note Ex. A-i:-

4, ""The amount due to be paid to you in full quit of your claims in the matter of your Siaying released your share in the lorry service which you and

A. V. Wjeraraghavalu Naidu (second defendant) out of us were carrying on in partnership to the aforesaid Veeraraghavalu Naidu having been

settled through mediators and ourselves having agreed to pay to you, the amount due to you pay Rs. 5000/-;

These appear to us to be clinching circumstances from which there can be no escape from the conclusion that the amount of the suit promissory

note represented the amount which, on a settlement of the accounts of the partnership between the plaintiff and the second defendant, the second

defendant was found liable to pay to the plaintiff, according to the decision of the panchayatdars. The learned judge of this Court, the decided the

appeal, has referred to the fact that the plaintiff advanced Ks. 3000/- to the second defendant for purchase of the lorry. The learned Judge then

observed.

From the evidence, it is also clear and beyond any dispute that the plaintiff was to get back the sum of Rs. 5000/- towards the capital he

advanced for the purchase of the lorry and that the Jorry should become the absolute property of the second defendant thereafter.

The learned Judge also referred to the fact that the partnership agreement was

not forthcoming, and that the terms of the partnership were not made known through the deposition of the witnesses. With very little besides these data before him, the learned Judge arrived at the finding that the amount of the promissory note was only in lieu of the advance made by the plaintiff to the second defendant for the purchase of the lorry, and therefore the plaintiff stood in the position of a financing creditor, but this finding, with due respect to the learned Judge, goes contrary to the plaintiff's own averments in the plaint, his own evidence, and the recitals in the promissory note. Though there is an identity between the amount of Rs. 5000/- which the plaintiff advanced as capital, and the amount of the suit promissory note, from that circumstance it will not be possible to ignore the admitted facts, that after the capital was advanced, the lorry was purchased the business was conducted for a considerable time between the two partners each agreeing to take half share in the profits and losses, and on differences arising between them mediators settled those differences, the execution of the suit promissory note and the defendants 1,3 and 4, standing as sureties, forming an essential element in the settlement of the accounts of the partners. Therefore, we have to differ with respect from the finding of the learned Judge, and we confirm the finding of the trial Court, that the suit promissory note represented the amount advanced by the second defendant to the plaintiff on the settlement of the accounts of the partnership.

7. The learned Judge, apparently, did not consider it necessary to decide whether the partnership was illegal, being opposed to public policy and being in contravention of the provisions of the Motor Vehicles Act. A considerable volume of decided cases was cited before him, as they were cited before the trial Court, and also before us, We have got to consider the effect of the decisions briefly, so far as the suit partnership is concerned. It is admitted in the evidence of the plaintiff already extracted above, that the capital was advanced by the plaintiff and after taking the second defendant as a working partner, the plaintiff and the second defendant purchased a second hand lorry for the partnership and worked the lorry as a transport lorry under the name and style of Mahiszchi Lorry service, using the route permit obtained from the authorities in the second defendant's name. Under , Section 42 (i) of the Motor Vehicles Act, 1939, no

owner of a transport vehicle shall use, or permit the use, of, the vehicle in any public place, save in accordance with the conditions of a permit authorising the use of the vehicle in that place in the manner in which the vehicle is being used. There is a definition of "owner" in Section 2 (19) of the Act, that it will include where the person in possession of a motor vehicle is a minor, the guardian, and in relation to a motor vehicle which is the subject of a hire purchase agreement, the person in possession under that agreement. This is only an inclusive definition. therefore the word "owner" has to be given the ordinary meaning of a person who is entitled to the vehicle and is also in possession thereof. From the evidence of the plaintiff, it would appear that the partnership was the owner of the vehicle. It is common ground that the vehicle was used with a permit obtained by the second defendant. This is clearly a contravention of Section 42 (i) of the Act. Section 59 (i) of the Act prohibits the transfer of a permit from one person to another except with the permission of the transport authority. Without such permission, the transfer will not operate to confer on any person to whom the vehicle is transferred, any right to use the vehicle in the manner authorised by the permit. In other words, if the partnership wanted to use the vehicle, for which the permit was obtained in the name of one partner, it was necessary to get the permission mentioned in Section 59 (r). Rule 196 and Rule 197 of the Rules framed under the Motor Vehicles Act provide for the formalities to be observed, when a permit has to be transferred from one person to another. Section 112 of the Act makes any contravention of the provisions of the Act or the Rules thereunder a criminal offence punishable with fine. Section 123 provides for the punishment of a person who causes or allows a motor vehicle to be used without a permit required under Sub-section (i) of Section 42 or in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used. It is clear, therefore that, the partnership in using the motor vehicle, for which the permit had been obtained in the second defendant's name, contravened the provisions of the Motor Vehicles Act. The partnership was illegal and opposed to public policy.

8. In Maniam Hiria Gowder Vs. Naga Maistry, , the Bench consisting of the learned Chief Justice Rajamannar and Panchapakesa Aiyar, J., after

referring to a long catena of cases starting from Velu Padayachi Vs. Sivasooriam Pillai, , observed, that an agreement of partnership which will

entail a transfer of licence or permit granted by the Government, when there is an express provision prohibiting such a transfer, was illegal and void

ab initio. That decision dealt with a case, where there was a partnership in respect of a lorry business, and as in this case, which involved the

transfer of a permit, and there was a contravention of Section 59 (i) of the Motor Vehicles Act and therefore the partnership was illegal and void.

It is unnecessary to recapitulate the long line of cases which have followed Velu Padayachi Vs. Sivasooriam Pillai, . It was followed in K.

Viswanathan Vs. Namakchand Gupta and Another, which related to a case in respect of a partnership for conducting a cinema theatre, but with

the licence in the name of one of the partners. In S.M. Kannappa Nadar Vs. K.K. Karuppiah Nadar, , a reconsideration of the decision in Velu

Padayachi Vs. Sivasooriam Pillai, was sought before a Full Bench of this Court. The learned Advocate General apparently submitted that a

contract could not be held to be necessarily illegal because it might be carried out unlawfully, and that so long as THE Parties can carry out lawfully

without infringing in any manner the provisions of the statute, for example, by allowing the licensee alone to sell certain articles in accordance with

the statute and allowing the partners who had no licence to participate only in the benefits of the business, there would be no contravention of the

prohibitory provisions of the statute, and that the agreement would be valid. But later on the Advocate General did not pursue the point, and the

Full Bench did not go into the correctness of the decision in Velu Padayachi Vs. Sivasooriam Pillai, , and the later decision in T.S. Govindaraj Vs.

A.B. Kandaswami Goundar and Another, , which followed it. Then the Full Bench proceeded to observe that it could be taken as settled law, that,

if a contract is forbidden by a statute, either expressly or by necessary implication or the contract itself is ex-facie illegal, or where the contract

though legal can be performed only illegally or was intended to be so performed, neither party would be entitled either directly or indirectly to

enforce his rights under such a contract.

9. The crux of the matter in this case is that the partnership was formed for the purchase of the lorry and therefore to own it, and thereafter to run

the lorry for a lorry transport service with the permit in the 2nd defendant's name. The partnership fully carried out the above scheme. The second defendant was a partner, and as a partner, he became an agent of the partnership as well as the other partner, and the running of the lorry with the permit of the 2nd defendant, involved a contravention of the Motor Vehicles Act, namely, the user of the lorry by the owner namely the partnership, who had no licence in its name. The view in *Velu Padayachi Vs. Sivasooriam Pillai*, is still good law, and therefore, we are of the opinion that the partnership in this case was an illegal one, and therefore the suit claim which arose out of the settlement of the accounts of the partnership is also illegal and cannot be so enforced.

10. Point 2: The second point for consideration is whether even if the suit claim becomes illegal and unenforceable for the abovesaid reasons, the plaintiff can be given any relief by way of getting back the moneys invested by him in the partnership, as an equitable relief. In the view of Basheer

Ahmed Sayeed, J., the plaintiff could be given such a relief in the alternative, and for this purpose, he relied upon two decisions of this Court in *K.*

Viswanathan Vs. Namakchand Gupta and Another, and *Maniam Hiria Gowder Vs. Naga Maistry*, was a case where the plaintiff who had

entered into a partnership in respect of a cinema theatre to be conducted under the licence of one of the partners, filed a suit for declaration of the

cancellation of the deed of partnership on the ground, that it was illegal. The Court held that the plaintiff's relief was one u/s 39 of the Specific

Relief Act and in such a case, before the relief could be given to the plaintiff, he could be directed u/s 41 of the Specific Relief Act, to make such

compensation as the justice of the case might require as part of the adjudication. In *Maniam Hiria Gowder Vs. Naga Maistry*, a decision already

cited, there is an observation that the fact of the dismissal of the suit for dissolution of the partnership and taking of account, on the ground that it

was not sustainable, would not mean that the appellant might not have the rights enforceable as against the other partners, and that such rights were

not affected by the decision in appeal. But they did not say what those rights could be.

11 *K. Viswanathan Vs. Namakchand Gupta and Another*, was a case, where the plaintiff himself filed the suit u/s 39 of the Specific Relief Act and

therefore Section 41 of the Specific Relief Act was applied directing the plaintiff to make such compensation to the other party, as justice might

require. But here the plaintiff has not sought for any declaration u/s 39. It is the defendants who seek to non-suit the plaintiff, and therefore, the

provisions of Section 41 of the Specific Relief Act cannot be applied. K. Viswanathan Vs. Namakchand Gupta and Another, also refers to the fact

that when the partnership was formed the decision in Velu Padayachi Vs. Sivasooriam Pillai, had not been rendered, and it was thereafter that

steps were taken by various authorities including the Income Tax authorities and the Commissioner of Police to declare the partnership illegal and

to cancel the licence for running the cinema. But in the present case, the parties had entered into the partnership with the full awareness of the

prevailing law about illegal partnerships, and the consequences of taking part in such an illegal partnership. We are of the opinion that no equity can

be worked out for granting relief to the plaintiff in this case. Further, the capital advanced by the plaintiff has been ploughed into the business. The

business had worked for a number of years, we have also no opportunity of finding out what reasons led the mediators to settle the accounts

between the plaintiff and the 2nd defendant, in the manner that they did.

12. Learned counsel Mr. V. Thiagarajan who appeared for the respondent (plaintiff) referred to a line of cases in India and also a line of cases in

England, which appear to us, however, to deal with totally different situations. Shiam Bihari Lal v. Malhi, 38 Ind Cas 178 : AIR 1917 All 54 was a

case of the Allahabad High Court where the defendant obtained a licence from the Government to sell drugs and contracted with the plaintiff that,

in consideration of the latter advancing moneys to the former, he would share the profits with him in a certain proportion. The relevant rules

prohibited transfers and sub-leases of the licence except with the sanction of the Collector. The Allahabad High Court held that the contract in

favour of the plaintiff was neither a transfer nor a sub-lease of the licence, as it did not entitle him to sell any goods of any sort of the description

covered by the licence. In Radhey Shiam v. Mewa Lal, 116 Ind Cas 89 : AIR 1929 AH 210, which also arises from the Allahabad High Court,

there was an agreement with a liquor contractor, and there was a transfer whereby in consideration of money contributed by the latter, the former

agreed to give him a share in the profits arising from the business, and it was held that the contract did not amount to a transfer of sub-lease of the liquor contract which was prohibited under the relevant rules. They followed the earlier case above referred to. These cases can be distinguished because in the present case the admitted evidence is not that the plaintiff advanced some money to the and defendant under the distinct understanding that the second defendant should run the lorry business in his name, and pay the plaintiff a share in the profits by way of a return on the loan advanced. It was a case of a partnership being deliberately formed, no doubt with the amount advanced by the plaintiff being treated as working capital, work the lorry as a road transport vehicle, with the help of a licence obtained in the name of the 2nd defendant, the lorry being purchased by the partnership, and treated as its asset. There is, therefore, no scope for applying the principle of the cases of the Allahabad High Court to this case.

13. In a case, where the sale of a motor vehicle was illegal being in contravention of the relevant motor vehicle regulation in Malaya and when the buyer sought to recover the vehicle from the seller, the seller pleaded the illegality of the transaction, the Privy Council in *Sajan Singli v. Sardara*

Ali, 1960 1 All ER 269, held that even though the transaction might be illegal, the buyer was entitled to relief either in detinue or in trespass, on the

principle "let the estate lie, where it falls". They followed an earlier decision in *Bowmakers Ltd. v. Barnet Instruments Ltd.*, 1944 2 All ER 579.

Green Berg v. Cooperstein, 1926 1 Ch 657. Another case cited by Sri V. Thiagarajan for the respondent, dealt with the recovery of amounts paid

by subscribers to a club whose objects were illegal. It was held that the contributors could recover the money before it had been applied for the

illegal purpose. But here the position is the money advanced by the plaintiff is as share capital and it had been ploughed into the business and

utilised for the illegal purpose. *Kiriri Cotton Co. v. Dewani*, 1960 AC 192, of the House of Lords, the last of the cases referred to by the learned

counsel for the respondent, during the course of this part of the argument dealt with the suit of tenant who had paid to the landlord an amount as

premium for obtaining a lease, which was illegal for the landlord to levy, their Lordships on the facts of the case held that the tenant was entitled

to recover the amount under the common law, because, the parties were not in pari delicto. That case was decided on its own facts and could not be applied properly to the present case.

14. There was further a faint attempt by the respondent's learned counsel to apply the principle called the doctrine of unjust enrichment referred to

in Govindarajulu Naidu and Others Vs. S.S. Naidu alias Soundararajulu Naidu, , a case decided by Ramaswami, J.: from the point of view of

Section 41 of the Specific Relief Act following the decision of this Court in K. Viswanathan Vs. Namakchand Gupta and Another, . That decision

could also be distinguished, for the reasons already mentioned. We are therefore of the opinion that, in the circumstances of this case, the plaintiff

cannot be given any relief for recovery of the amount advanced by him to the illegal partnership.

15. Point 3: On the third point regarding the liability imposed on the sureties, defendants I, 3 and 4, by the judgment of Basheer Ahmed Sayeed, J.,

the following considerations arise. The finding that defendant 1, 3 and 4 joined in the execution of the bond only as sureties has been arrived at by

the trial Court as well as by Basheer Ahmed Sayeed, J., and is not disputed before us by either party. Basheer Ahmed Sayeed, J., purported to

follow Section 126 of the Contract Act and the decisions in Mir Mohamed Khan v. Abdul Karim, AIR 1939 Lah 187, Kashiba v. Shripat

Narashiv, ILR TQ Bom 697 and AIR 1940 327 (Nagpur) These decisions are based on the ground that the liability which they sought to declare

was not a liability of a surety as such, which has been held to be different from that of an in-demnifier. Section 124 of the Indian Contract Act

defines a contract of indemnity, as a contract by which one party promises to save the other from loss, caused to him, by the conduct of the

promiser himself or by the conduct of any other person. It is, therefore, in the nature of compensation for a loss. But, Section 126 defines surety as

a person who gives a contract of guarantee which is a contract to perform the promise or discharge the liability of a third person, in case of his

default. Section 128 states that the liability of the surety is co-extensive with that of the principal debtor. This distinction between the two terms has

to be borne in mind, for the purpose of considering the above line of cases relied on by Basheer Ahmed Sayeed, J. The decision in ILR 19 Born

697 is the leading case on this topic, and the later decisions only followed the view taken in that case. In ILR 19 Bom 697, there was a finding that

the surety to a bond passed by a minor was liable. These cases were considered in *Edavan Kavingal Kelappan Nambiar Vs. Moolakal Kunhi*

Raman and Another, by a Bench of this Court consisting of *Rajagopalan and Rajagopala Aiyansar, JJ.* They also discussed the later decision of

the Nagpur High Court in AIR 1940 327 (Nagpur) After examination of the relevant authorities, they held that, in the absence of special

circumstances like fraudulent representation, or in the absence of other features from which a Court can infer a contract to be one of indemnity, as

defined u/s 124 of the Indian Contract Act the liability of the surety is only ancillary and rests only on a valid obligation on the part of the party

whose debt or obligation is guaranteed.

16. We respectfully follow this view. It must be said, in fairness to the learned Judge, that the decision in *Edavan Kavingal Kelappan Nambiar Vs.*

Moolakal Kunhi Raman and Another, does not appear to have been mentioned to him. We are of the opinion that, where the liability of the

principal is held to be not enforceable, on the ground of the contract being illegal there is no question of the surety being made liable. Therefore,

this finding of the learned Judge is also reversed.

17. The appeal is allowed, and the decree of the trial Court is restored. The appellant will get the costs of the appeal as well as of the Letters

Patent Appeal from the contesting respondent.