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Judgment 2.2.1965

IN THE PRIVY COUNCIL No. 37 of 1963

ON APPEAL FROM THE COURT OF APPEAL

OF THE STATE OF SINGAPORE

B E T W E E N :-

ATURELIYA WALENDAGODAGE HENRY SENANAYAKE Appellant

-and-

ANNIE YEO SIEW CHENG Respondent

CASE FOR THE RESPONDENT Record

10 1. This is an appeal from the judgment of the Court of Appeal of the State of Singapore (Rose, C.J., Buttrose and Chua, JJ.) dated the 28th June, 1962, allowing the Respondent's appeal from an order of the High Court of the State of Singapore (Ambrose, J.) dated the 3rd November, 1961, which had dismissed the Respondent's claim for repayment of $20,000 paid by her for five shares of the Appellant's holding in a firm of stockbrokers. pp.181-189 p.165

2. The Respondent issued a writ in the High Court of the State of Singapore, with the Statement of Claim endorsed thereon, on the 21st July, 1959. By her re-amended Statement of Claim, filed on the 17th July, 1961, the Respondent claimed the return of $20,000 paid on the 20th April, 1959, for five shares of the Appellant's holdings in the firm of Sena & Goh. The sum had been paid to that firm at the Appellant's request, on the untrue representation by the Appellant that the firm was a gold mine. The payment had been made subject to the Malayan Sharebrokers' Association approving of the Respondent becoming a partner in the firm, and subject to the certified accounts of the firm for 1958 being shown to the Respondent. Neither of these terms had been carried out. p.1 pp.8-10

3. By his amended Defence, filed on the 2nd August 1961, the Defendant admitted that the Respondent had paid $20,000 for the shares mentioned in the Statement of Claim, but alleged that she had herself pp.11-13

offered to buy the shares, had then been told of the firm's recent financial position, and had inspected the accounts for 1958. The purchase had taken place, and thereafter the Respondent had acted as a partner. The Appellant denied that he had represented to the Respondent that the firm was a gold mine. He also denied the terms of the purchase alleged in the Statement of Claim, but alleged that those terms had been carried out. By the agreement of the Respondent and the other partners, the partnership had been dissolved.

p.165 4. The trial of the action in the High Court before Ambrose, J. occupied 17 days between the 17th April, 1961 and the 3rd November, 1961. On the latter day judgment was given for the Appellant with costs.

p.167,l.11-p.168,l.2 5. The following facts were not in dispute:

(i) in 1955 the Appellant and one Goh executed a partnership deed, and began business as stock and share brokers in Singapore under the style of Sena & Goh;

(ii) the capital of the firm consisted of $100,000, of which $51,000 was contributed by the Appellant and $49,000 by Goh;

(iii) on the 26th March, 1959 the Appellant and Goh executed a supplemental deed, by which Goh transferred $14,000 of his share in the capital of the firm to each of his two infant children, with the intention that each of them should become a partner in the firm on the 26th March, 1959;

(iv) on the 3rd April, 1959 the Appellant, Goh and one Tan Eng Liak executed a deed, under which Tan became a partner in the firm by buying (for $40,000) $10,000 of Goh's remaining share of $21,000 in the capital of the firm;

(v) on the 20th April, 1959 the Respondent paid to the Appellant $20,000 for $5,000 of the Appellant's share in the capital of the firm (the interest in the firm thus acquired by the Respondent has throughout the proceedings been called 'five shares').

Record

6. The following concurrent findings of fact were made upon the evidence by Ambrose, J. and the learned Judges in the Court of Appeal: p.170,l.47-p.172,l.9; p.173,l.39-p.174,l.22

(i) on the 13th April, 1959 the Appellant asked the Respondent (who had worked for the firm as a broker since October, 1955) to buy some of his shares in the firm; p.183,l.37-p.184,l.15; p.185,ll.11-12, 20-22

(ii) on this occasion the Appellant told the Respondent that the firm was a gold mine;

(iii) by this representation the Appellant meant, and was understood by the Respondent to mean, that it was a flourishing business;

(iv) this representation was material, and by it the Respondent was induced to agree to buy five of the Appellant's shares;

(v) the firm was not a flourishing business on the 13th April, 1959;

(vi) on the 20th April, 1959 the Respondent signed a statement that the firm's books of account and the balance sheet as at the 31st December, 1958 had been shewn to her; the Respondent had not then seen the books of account or the balance sheet, and she signed the statement because one Sivam, the firm's accountant, told her it would have to be produced to the Malayan Sharebrokers' Association before the Association would approve of her becoming a partner.

7. The Respondent, in her evidence, dealt with the matters set out in paras. 5 and 6 above. She went on to say that up to the end of May, 1959 she had continued to work as a broker, until Goh had gone on holiday, when she had taken his place as managing partner. She had then had an opportunity to look at the books, and had found that there were large debts which could not be collected, amounting to hundreds of thousands of dollars. At that time the Appellant had asked her to collect as many debts as possible, and had said that his overdraft was very heavy, amounting to over $250,000. The Respondent had then become very suspicious, and at the end of June, after Goh had returned, she had seen Sivam and complained that the Appellant and the whole lot had swindled her. Sivam had said that the pp.18-69 pp.26-28

Record

debts could be collected, but had also said, "Since you had paid the money the real truth is that Mr. Sena knew that the firm was bad and he wanted to lighten his burden". At a meeting on the 29th June, 1959, the Respondent had asked the Appellant for her money back. He had refused, had asked the Respondent and others to put in more money, and had threatened that he would take drastic action if they did not. After he had repeated this the next day, she had consulted her lawyers. They wrote to the Appellant on the 1st July, 1959, demanding the repayment of her $20,000 and renouncing any claim to a share in the firm.

pp.203-204

8. In cross-examination, the Respondent said that she had never become a partner in the firm. She considered that the Appellant had made untrue statements about the prosperity of the business. She had not discovered the true financial position until the end of June, by which time she had taken various steps towards becoming a partner.

pp.70-100

9. Dr. S.D.G. Kiani gave evidence corroborating the Respondent's account of the meetings of the 13th and 17th April, 1959.

pp.101-115

10. Tan Sin Seng gave evidence for the Respondent, and said that he had been a broker employed by Sena & Goh from 1957. In 1958 he had been allowed to speculate on credit given by the firm, and in 1959 had owed the firm over $220,000, for which he had been sued by the firm. In January, 1959 the Appellant had told the witness that he had a heavy bank overdraft and wanted to find a buyer for his shares so that he could get out of the business.

pp.197-198
pp.124-138

11. On the 15th July, 1959, the Appellant, the Respondent, Goh and Tan Eng Liak agreed that receivers and managers should be appointed without delay, with a view to winding up the business of Sena & Goh. Jee Ah Chian, an accountant, said that he had been appointed one of the three receivers and managers of Sena & Goh in July, 1959. At that time the amount due from sundry debtors was $1,616,560, and it was doubtful how much could be recovered. The bank overdrafts were $343,557, and the amount due to sundry creditors $1,425,852. The firm's financial position was bad.$2,000,000 was subsequently collected from sundry debtors and paid out.

Record

12. The Appellant gave evidence, in which he contradicted the Respondent's account of the matters set out in para.6 above. He also said that, after paying the sum of $20,000, the Respondent had been introduced to the rest of the staff of the firm as a new partner, and thereafter had been treated as a partner. She had been accepted by the Malayan Sharebrokers' Association, after an interview, as a partner, and the Appellant considered that she had been a partner since the 20th April, 1959. There had been no condition that she would not be a partner until a formal deed had been drawn up. pp.139-157

13. Goh and Sivam also gave evidence for the Appellant.

14. The action was dismissed with costs by Ambrose, J. on the 3rd November, 1961, and on the 29th March, 1962 the learned Judge gave his reasons for judgment. He first dealt with the matters set out in paras. 5 and 6 above, and in doing so said he did not believe the evidence of the Appellant or that of Sivam. He then held that the Respondent had paid the $20,000 in order to become a partner in the firm, and it had not been a term, express or implied, that either the agreement or the payment was subject to the Malayan Sharebrokers' Association approving of her becoming a partner. He also held that neither the agreement nor the payment had been subject to the certified accounts of the firm for 1958 being shown to the Respondent. p.165 pp.166-177

15. Ambrose, J. then rejected the Appellant's submission that money paid under a contract induced by misrepresentation could not be recovered unless rescission were claimed and obtained, but held that, since the contract had been in part performed and the Respondent had obtained some benefit, she was unable to establish a total failure of consideration. From the 20th April, 1959, he said, the Respondent had regarded herself as, and had acted as, a partner. She had attended partners' meetings and inspected the books. The other partners had treated her as a partner, and she had had some publicity in a newspaper as having become a partner. The agreement between the Appellant and the Respondent had not, the learned Judge held, been subject to the execution of a formal partnership deed. He had accordingly given judgment for the Appellant.

16. The Respondent appealed to the Court of Appeal.

Record

pp.178-180

In her Memorandum of Appeal, dated the 26th April, 1962, she contended that Ambrose, J. had erred in various respects, including the following:

(a) in holding that the action was not maintainable if there had been no total failure of consideration;

(b) in not holding that the Respondent was entitled to rescind her agreement with the Appellant;

(c) in holding that the Respondent had derived from the agreement any benefit such as to preclude her from contending that there had been a total failure of consideration; and

(d) in holding that the Respondent had become a partner in the firm of Sena & Goh.

pp.181-188

17. The Court of Appeal (Rose, C.J., Buttrose and Chua, JJ.) gave judgment on the 28th June, 1962. Rose, C.J. said that the learned Judge's decision on the facts was justified. Ambrose, J. had disbelieved the Appellant's evidence, and would have been quite unreasonable to believe it. Fraud had not been pleaded, but, where innocent misrepresentation only was pleaded and the evidence established something more, a plaintiff's position was no worse than it would have been if he had been able to establish only innocent misrepresentation. The position was that the Respondent had been at the lowest a de facto partner, and it was from that position that she had seen the books. She had not been guilty of any unreasonable delay after paying her money on the 20th April, 1959. Instead of investing it in a thoroughly good business she had been misled into investing it in a thoroughly bad business, and the five shares for which she had paid $20,000 had to all intents and purposes been worthless.

18. It had been contended, the learned Chief Justice went on, that the action should fail, because the Respondent, having been made a partner, had had the benefit of some consideration. All she had had was the arid, naked honour of being able to say she was a partner. At the trial, the Respondent's application to amend her pleadings so as to claim rescission had been refused, and the case had proceeded on the basis of money had and received. Where money had been paid upon a

representation, and nothing had happened to make it impossible, or even unreasonably difficult to restore the parties to their original position, such an action lay on the same basis as an action for rescission. In the circumstances of the case, in view of the shortness of time between the purchase of the shares and the Respondent's resiling from the transaction, the appropriate remedy was for the parties to be placed in the same position that they were in before the Respondent purchased the shares upon the false representation of the Appellant. The appeal should therefore be allowed, and judgment entered for the Respondent for $20,000.

19. Buttrose and Chua, JJ. agreed with Rose, C.J. p.189

20. The Respondent respectfully submits that the judgment of the Court of Appeal was correct and should be upheld. Ambrose, J. and the Court of Appeal made concurrent findings of fact, that the Appellant made untrue representations to the Respondent which were material, and upon those representations the Respondent acted by entering into the contract with the Appellant and paying $20,000 thereunder. The consideration for which the Respondent paid $20,000 failed totally, because she never was made a partner in the firm. Alternatively, if she did become a partner, there was still a total failure of consideration because the partnership was valueless. It was never suggested in evidence that the Respondent received anything as a partner, or that anything was paid to her in the winding up on account of any share in the firm belonging to her. The Respondent never affirmed the contract. Without any unreasonable delay, after discovering what misrepresentations the Appellant had made to her, she demanded repayment of her $20,000 and renounced any claim to a share in the firm.

21. The Respondent respectfully submits that in these circumstances she was entitled to judgment upon the ground that she had paid $20,000 to the Appellant for a consideration which had wholly failed. Alternatively, her Statement of Claim amounted, without any further amendment, to an adequate claim for rescission, and she was entitled to judgment for rescission of her contract with the Appellant and repayment of her $20,000.

22. The Respondent respectfully submits that the judgment of the Court of Appeal of the State of

Record

Singapore was right and should be affirmed, and this appeal should be dismissed with costs, for the following (among other)

R E A S O N S

1. BECAUSE there are concurrent findings of fact in favour of the Respondent:

2. BECAUSE the Appellant made material misrepresentations to the Respondent:

3. BECAUSE the Respondent was induced by these misrepresentations to enter into her contract with the Appellant:

4. BECAUSE the Respondent received no consideration for the $20,000 which she paid under that contract:

5. BECAUSE the Respondent was entitled to have that contract rescinded:

6. BECAUSE of the other reasons given in the judgment of Rose, C.J..

J.G. LE QUESNE

MERVYN HEALD

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CASE FOR THE RESPONDENT

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