

No. 40 of 1970

IN THE PRIVY COUNCIL

O N A P P E A L

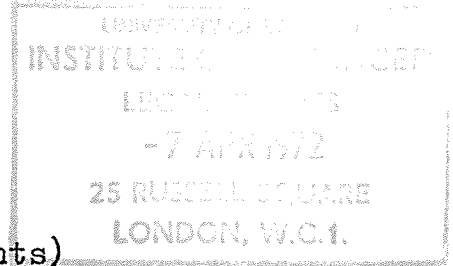
FROM THE SUPREME COURT OF CEYLON

B E T W E E N

THE JUPITER CIGARETTE & TOBACCO CO.
LIMITED (Defendant-Respondent)
Appellant

AND

- 10 1. DR. HENNEDIGE CHARLES HENRY SOYSA
 - 2. H. R. FERNANDO & CO. LTD.
 - 3. CEYLON FINANCE & SECURITIES LTD.
- (Plaintiffs-Appellants)
Respondents



CASE FOR THE APPELLANT

RECORD

1. This Appeal arises in an hypothecary action instituted by the Respondents seeking to recover from Appellant Company an aggregate sum of Rs. 125,000/- and interest on mortgage bond dated 13th August 1960 produced marked "P 1."

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P.14

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The Appellant Company in its Answer pleaded that :-

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- (a) It denies having borrowed and received from the 1st, 2nd and 3rd Respondents the sum of Rs. 57,000/-. Rs. 21,000/-. and Rs. 47,000/-. respectively or any sum whatsoever
- 30 (b) In any event (i) the alleged borrowing and/or the alleged execution of the bond was not for the purposes of the Appellant

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Company (ii) there was no resolution or decision in terms of the Articles of the defendant company to borrow the alleged sums or for the alleged execution of the said bond or resolution authorising the alleged borrowing or the alleged execution of the bond

- (c) for the reasons set out in (i) or (ii) above, the alleged borrowing of the said sums or the alleged execution of the said bond is ultra vires of the company and/or the said bond is not binding on the company 10
- (d) to the knowledge of each of the Respondents the Appellant company did not borrow any sum whatsoever from the Respondents or any of them and/or that the alleged borrowing or the said alleged execution of the bond was not for the purposes of the Appellant
- (e) there is a misjoinder of parties and causes of action 20

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The Additional District Judge of Colombo by his judgment held that no meeting of the shareholders of the Appellant was held on 12th August 1960 at which the purported resolution (P5) referred to in P1 was passed. The District Judge held that the evidence, real as well as circumstantial is sufficient to contradict the recital in P1 although it is a notarial document, and also the minutes P5. In view of this the Defendant-Company had no power to borrow money. In view of the said findings the District Judge dismissed the Respondents' action with costs. 30

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The case had proceeded to trial on the following issues :-

1. Did the defendant by Bond No. 432 dated 13.8.60 bind itself to pay the plaintiffs the respective sums therein mentioned aggregating to Rs. 125,000/- with interest at 10% per annum?
2. Did the Defendant, for further securing the payment of the said sums referred to in issue 1, mortgage to the Plaintiffs, by way of primary mortgage, the properties referred 40

to in the said bond and described in Schedules 1 and 2 to the plaint?

3. Did the Defendant fail to pay the said sum referred to in issue 1 with interest from 13.6.62?
4. If issues 1, 2 and 3 are answered in the affirmative are the Plaintiffs entitled to:
 - (a) judgment in a sum of Rs. 125,000/- with interest at 10% per annum from 13.6.1962?
 - (b) enforce the mortgage upon the said bond No. 432 in terms of the prayer to the plaint?
5. Did the defendant by the said bond, mortgage to the 1st, 2nd and 3rd Plaintiffs the property described in the schedule to the plaint, for the repayment of the respective sums due to the 1st 2nd and 3rd Plaintiffs?
6. Is there a misjoinder of parties and causes of action in the plaint?
7. If issue 6 is answered in the affirmative, can the plaintiffs have and maintain this action?
8. (a) was the alleged borrowing and/or the alleged execution of the bond for the purpose of the defendant company?
 - (b) was there a resolution or decision of the defendant company
 - (i) to borrow the alleged sums, or
 - (ii) for the alleged execution of the said bond, or
 - (iii) authorising the alleged borrowing and/or the alleged execution of the bond?
9. If issue 8 (a) and/or (b) be answered in the

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negative was the alleged borrowing or execution of the bond ultra vires of the defendant company?

10. If issue 9 is answered in the affirmative, can the plaintiffs have and maintain this action?
11. In any event are the Plaintiffs entitled to the relief claimed in the plaint?

The District Judge however in view of the above findings had not answered issues 5, 6, 7, 8 (a) and 11. 10

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The Supreme Court of Ceylon (H.N.G. Fernando C.J. and Sirimanne J.) held that :-

- (1) E. A. S. Appuhamy on 13th August 1960 was a Director of Appellant and that this fact was never in dispute
- (2) the sum alleged to have been borrowed was admittedly much less than the subscribed capital of the Appellant company at that time 20
- (3) there was no necessity for a meeting or a resolution authorising the borrowing as long as it was done by two directors for the purposes of the Company
- (4) it could not be seriously contended that the money borrower was not utilized for the purposes of the Company
- (5) it is not suggested that this was anything but an honest and bona fide transaction
- (6) the principle laid down in Parker and Coper Limited -vs- Reading and James (136, Law Times, Page 170) is applicable. 30
- (7) there is no misjoinder of parties and causes of action.

In view of the above findings the Supreme Court set aside the judgment of the District Judge and entered judgment for the Respondents as prayed for in the plaint together with costs of appeal.

On 5th May 1969 the Appellant was granted Conditional Leave to Appeal to the Privy Council and on 26th June 1969 Final Leave

10 The Appellant submits that the above findings of the Supreme Court are erroneous and thus the Appeal of the Appellant should be allowed and the Respondents' action be dismissed with costs of this Appeal in addition to costs in the District Court and Supreme Court for the following amongst other

R E A S O N S

- 20 (a) BECAUSE the finding of the Supreme Court set out in (1) above is wrong. The District Judge has held that in view of the evidence and particularly documents D7 and D33 E.A.S. Appuhamy became a shareholder only on 13th August 1960. In view of the finding of fact by the trial Judge that no alleged General Meeting of Appellant took place on 12th August 1960, E. A. S. Appuhamy was not a duly appointed Director of the Appellant Company at the time P1 was executed (see P11 and P5)
- 30 (b) BECAUSE the finding of the Supreme Court set out in (2) above is wrong. It is correct that this matter was not only never in question (the Supreme Court has erred in stating not in "dispute") but the Respondents have failed to establish this fact. The evidence available shows that the subscribed capital was Rs. 324,100/--. whilst the documents D1A, d1B and D1 established that the amount borrowed by the Appellant and then outstanding together with the sum of Rs. 125,000/-- on P1 would exceed the amount of the subscribed Capital (p 34). The Respondents for the purposes of this action did not rely on regulation 69 of the Articles of the Appellant Company but on the Extraordinary General Meeting which was held by the Trial Judge to have not taken place.
- 40 (c) BECAUSE the finding of the Supreme Court set out in (3) above was not based on any issue between the parties that arose for consideration.

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- (d) BECAUSE the Supreme Court erred in reason set out in (4) above by holding that it could not be seriously contended that the money borrowed was not utilized for the purposes of the Company as issues raised at the trial made it clear that this was not so and the evidence both oral and documentary established that the money borrowed was not utilized for purposes of the Company 10
- (e) BECAUSE the finding of the Supreme Court set out in (5) above is wrong as the defence of the Appellant Company was that this was not an honest and bona fide transaction as regards the Company and that it was purely for the purposes of the Directors to transact shares to the detriment of the Company
- (f) BECAUSE the principle laid down in the said case is not applicable (see also In Re George Newman & Co. 1895 In 674). 20
- (g) BECAUSE the Supreme Court erred in this finding set out in (7) above as there is a clear misjoinder of parties and causes of action.
- (h) BECAUSE the purported resolutions and bond Pl had not been entered into for the purposes of the Appellant company
- (i) BECAUSE documents had been prepared subsequently to show that a meeting took place on 12th August 1960, when in fact as the Trial Judge held no such meeting took place 30
- (j) BECAUSE it has been clearly established that the transferors of the share of the Company had given E.A.P. Edirisinghe who was a Director credit in a sum of Rs. 125,000/-. for the purchase of the shares and as security had obtained the hypothecation of the properties of the Company by means of Pl. 40
- (k) BECAUSE Mr. M. Ranganathan (Proctor S.C.) 1st plaintiff Respondent and Mr. Selvanathan

who acted on behalf of 3rd plaintiff-
Respondent did not give evidence at the
trial although they were available

- 10 (1) BECAUSE even the Directors of the Company had not resolved to enter into Bond Pl or to borrow the said sum of Rs. 125,000/- for purposes of the Appellant Company. The only basis on which the Respondents relied was the alleged resolution of the General Meeting of 12th August 1960
- (m) BECAUSE by preparing documents the Respondents and/or their agents (Mr. H. R. Fernando and Mr. Selvanathan) have tried to camouflage and disguise the true nature of the transaction which to their own knowledge was not for purposes of the Appellant Company (P 34, 35, 43, 45, 46)
- 20 (n) BECAUSE by virtue of section 46 (1) of the Companies Ordinance the said transaction and bond Pl are unlawful

Section 46 (1) is as follows :-

30 "Subject to the provisions of this section,
"it shall not be lawful for a company to
"give, whether directly or indirectly, and
"whether by means of a loan, guarantee, the
"provision of security or otherwise any
"financial assistance for the purpose of or
"in connexion with a purchase made or to be
"made by any person of any shares in the
"company. Provided that nothing in this
"section shall be taken or prohibit:

"(a) where the lending of money is part of
"the ordinary business of a company, the
"lending of money by the company in the
"ordinary course of its business"

- (o) BECAUSE even interest on Pl had been paid by Mr. E. A. P. Edirisinghe (documents D3 to D6)
- 40 (p) BECAUSE there is a misjoinder of parties and causes of action. In the single document Pl there are three separate

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obligations (Law of Pledges and Mortgages in South Africa Wille 1920 Edition page 6). There was no massing of the three sums of money and making them payable jointly or severally (33 New Law Reports page 319 at page 322). It is submitted that section 65 of the Mortgage Act does not provide for this type of instance (9 New Law Reports page 68).

B. J. FERNANDO.

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HATCHETT JONES & CO.
90 Fenchurch Street,
London, E.C.3.