

Q.H.I. G. 3

10, 1954

No. 48 of 1950

In the Privy Council.

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL
(Gold Coast Session—ACCR.A)

37716

BETWEEN

1. AMOAH ABABIO, Ohene of Asamankese representing the Stool of Asamankese
2. BAFO KOFI BEMPON, Odikro of Akwatia representing the Stool of Akwatia - - Defendants-Appellants

UNIVERSITY OF LONDON
W.C.1.
24 FEB 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

10

AND

JOHN EDMUND TURKSON *Plaintiff-Respondent*

Case for the Appellants.

RECORD

1. This is an appeal from a judgment dated the 9th February, 1949 of p. 19 the West African Court of Appeal (Gold Coast Session—Accra) which set aside a judgment dated 1st October, 1947 of the Supreme Court of the Gold p. 7 Coast, Eastern Judicial Division of the Gold Coast Colony, which dismissed an action by the Respondent claiming an account of commission alleged to be due to him and an order for payment of the amount found due against the then representatives of the Stools of Asamankese and Akwatia.

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2. The material provisions of the Asamankese Division Regulation Ordinance, amendments thereto, and Regulations thereunder, are printed in an annexure to this Case.

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3. On the 22nd October, 1945 the Governor in Council of the Gold Coast p. 26 1-26 under s.6 of the Asamankese Division Regulation Ordinance issued a certificate which, after reciting that a claim by the Respondent against the Asamankese and Akwatia Stools for moneys alleged to be due to him under an agreement made in or about the year 1921 had been referred for consideration to the Executive Council and that the Governor in Council considered it desirable that the amount which ought to be paid in respect of the said claim should be adjudicated upon in an action against the Stools, certified that in the opinion of the Governor in Council the circumstances were such that the matter, to wit, the amount which ought to be paid in respect of the claim, might properly be the subject of legal proceedings by the Respondent against the Stools.

pp. 1-2

4. The Respondent thereupon, on the 29th August, 1946, issued a writ of summons constituting a statement of claim in which he alleged that in or about August 1921 it was agreed between the Respondent and the defendants, the then representatives of the Stools, that if the Respondent introduced to the defendants a company or companies who would enter into mining leases with the defendants in respect of minerals on the Stool lands and financed the prospecting for minerals the defendants would pay to the Respondent a commission of 5% of all rents or royalties paid by the company or companies introduced during the continuance of a mining lease or leases. The Respondent further alleged that the Stool lands were prospected at his expense and that on the discovery of diamonds he introduced to the defendants two named companies who entered into mining leases. The Respondent further alleged that he received commission at the rate of 5% from 1921 to 1935 but not since 1935 although the Respondent had orally and by letters requested payment. The Respondent claimed an account of all moneys by way of rents and royalties received by the defendants from the companies and of the commission due in respect thereof to the Respondent and payment of the amount found due.

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p. 3

5. On the 17th September 1946 the Respondent consented to an order requiring him to supply full particulars whether the agreement alleged was in writing or oral, and whether it was made in accordance with English law or native customary law. The particulars supplied stated that the agreement was oral and subsequently confirmed in writing, and that the agreement was in accordance with native customary law and English law.

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pp. 4-5

6. The defendants delivered a defence whereby they denied the making of the agreement alleged by the Respondent ; said that the alleged agreement was unknown to, invalid by and unenforceable under native customary law, and if purporting to be made in accordance with English law did not comply with the Statute of Frauds ; denied that any prospecting work had ever been done on the Stool lands by or on behalf of or at the expense of or on the instructions of the Respondent ; alleged that it was one Ahyia of Prankese employed by the Chiefs of Asamankese and Akwatia who prospected and discovered minerals on the Stool lands which were sent to European concessionaires resulting in the taking of concession leases by the named companies ; denied that the companies were introduced by the Respondent or any person acting for him ; denied the payment of commission to the Respondent but admitted certain payments from 1921 to 1935 which the defendants alleged to be ex gratia payments for services and for help in certain litigation ; denied the other allegations in the writ save for the admission that the Respondent had made an oral demand in 1940 ; and pleaded the Statute of Limitations.

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p. 5 1-40—
p. 6 1-40

7. On the 5th November, 1946 the Respondent joined issue with the defendants on their statement of defence ; alleged that he was not in the service of the two Stools in 1929 nor was he paid any money ex gratia or otherwise for service rendered in litigation. On the 21st August, 1947 the Respondent amended his reply to allege part performance sufficient to take the case out of the Statute of Frauds.

8. After a trial lasting 11 days Coussey, J., reserved judgment. On the 1st October, 1947 he delivered judgment in which he went fully into the issues and evidence relevant thereto and reached the conclusion that the agreement which the Respondent alleged and the consideration for it had never been entered into. He found no money to be due to the Respondent in respect of his claim in the suit, and accordingly gave judgment for the defendants with costs. As regards the contention that the certificate of the Governor in Council precluded the Court from finding that there was no binding contract between the Respondent and the defendants, Coussey, J., held that the Court's duty was not limited to adjudication only as to the amount. He construed the ordinance and certificate as empowering the Court to adjudicate upon the Respondent's claim as brought and to determine whether any money was due to the Respondent and if so the amount.

9. The Respondent appealed to the West African Court of Appeal on nine grounds of which the second was that the learned trial judge was wrong in re-opening and trying the whole case in the face of the certificate issued under s.6 of the Asamankese Division Regulation Ordinance. The West African Court of Appeal heard argument only on this second ground of appeal, and after reserving judgment, set aside the judgment of Coussey, J., on the 9th February, 1949 and remitted the case to the Court below to determine the amount which ought to be paid in respect of the Respondent's claim.

10. Lewey, J. A., held that in spite of the wide issues raised by the pleadings the point had been taken at trial that the effect of the certificate was to restrict the issues to the ascertainment of the amount due to the Respondent on his claim. Lewey, J. A., considered that on the proper construction of the ordinance and the certificate the issues were so restricted and that the trial judge had wrongly gone outside what alone he was competent to determine. There was a finding that no money was due to the Respondent in respect of his claim, but that finding could not be divorced from its contents and be treated as a proper determination of the question submitted to the Court by the certificate.

11. Sir Henry Blackall, P., agreed with the interpretation of the certificate given by Lewey, J. A. He did so with reluctance for he doubted if the members of the Executive Council realised that they were tying the hands of the Stools, and he thought it Gilbertian for Coussey, J., to be directed to ascertain what ought to be paid when after full consideration he came to the conclusion that nothing was due. However, there appeared to him no ambiguity in the proviso to s.6 of the Asamankese Division Regulation Ordinance. The ban upon legal proceedings was lifted to the extent mentioned in the certificate but no further, and in the present case it was not competent for the trial judge to inquire into the validity of the claim itself.

12. Smith, Acting C. J., concurred with the other members of the Court.

p. 24

13. Accordingly the West African Court of Appeal did not consider any other of the Respondent's grounds of appeal but remitted the case to the Supreme Court to determine the amount which ought to be paid in respect of the Respondent's claim.

14. The Appellants respectfully submit that the Supreme Court in the action brought by the Respondent had full power and was under a duty to ascertain upon what agreement the Respondent's claim was based and to determine all other matters relevant to the amount, if any, lawfully due to the Respondent. Accordingly the Appellants submit that the West African Court of Appeal was wrong in holding the Respondent's second ground of appeal to be well founded, that it should be declared that such second ground of appeal was unfounded, and that the judgment of the West African Court of Appeal should be set aside and the case remitted to the West African Court of Appeal to adjudicate upon the other grounds of appeal, for the following amongst other

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REASONS

- 1. BECAUSE by his writ of summons, constituting his statement of claim, and the particulars thereunder, the Respondent made allegations of fact concerning the contract upon which the Respondent relied ; and the Appellants were entitled to put those allegations in issue.
- 2. BECAUSE the certificate of the Governor in Council did not bind or entitle the learned trial judge to treat the validity or terms or performance of the contract alleged by the Respondent as established and not open to investigation by the Court.
- 3. BECAUSE the Respondent did not plead the certificate of the Governor in Council as determining any matter in favour of the Respondent or as excluding the Court from investigating such matter.
- 4. BECAUSE the West African Court of Appeal misconstrued the certificate of the Governor in Council and the legislation under which such certificate was given.
- 5. BECAUSE Coussey, J., rightly construed the certificate of the Governor in Council and the relevant legislation.

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FRANK GAHAN.

ANNEXURE**ASAMANGKESE DIVISION REGULATION**
(COLONY)

AN ORDINANCE TO MAKE PROVISION FOR THE CONTROL AND
REGULATION OF THE PROPERTY, REVENUES, AND EXPENDITURE
OF THE STOOLS IN THE ASAMANGKESE DIVISION.

Preamble

(30th March, 1935)

WHEREAS it is deemed expedient that the Government of the Gold
Coast Colony should in the interests of peace, order, and good government
control and regulate the property, revenues, and expenditure of the Stools
10 in the Asamangkese Division :

AND WHEREAS in furtherance of such control and regulation it is
deemed expedient that the Governor should be vested with the powers in
this Ordinance contained :

BE IT THEREFORE ENACTED by the Governor of the Gold Coast
Colony with the advice and consent of the Legislative Council thereof, as
follows :—

SECTION 2. . . . " Prescribed Officer " means the officer prescribed as the
Treasurer of the Stool Treasuries in the Asamangkese Division by
regulations made under Section 8 ; . . .

Interpreta-
tion

20 SECTION 3. There shall be established in the division of Asamangkese such
Stool Treasuries as the Governor may determine.

Establish-
ment of
Stool
Treasuries

SECTION 6. (1) From and after the date of the commencement of this
Ordinance no person shall without the consent of the prescribed officer
incur any debt or liability on behalf of the Stool.

No debt or
liability to
be incurred
by a person
on behalf of
a Stool
without the
consent of
the pre-
scribed
officer

30 (2) From and after the date of the commencement of this
Ordinance no action shall lie against a Stool or against any officer
appointed under Section 8 (e) for the collecting, safe custody, and
management of the revenue of a Stool and no execution shall issue or
be enforceable against the revenues of the Stool or any Stool property
in respect of any debt or liability incurred whether before or after
the commencement of this Ordinance by a person on behalf of the
Stool, unless such debt or liability if incurred after the commencement
of this Ordinance was incurred with the consent of the prescribed
officer.

Power of the Governor in Council to make regulations for control of revenues of Stools

SECTION 8. The Governor in Council may make regulations :—

(d) Prescribing the purposes to which such revenue may be appropriated and the amount that may be allocated to any of such purposes ;

(e) Appointing officers for the collection, safe custody, and management of such revenue and prescribing their duties and providing for their salaries and for removing and replacing them ;

(i) Permitting and regulating, notwithstanding the provisions of section 6 (2), the discharge of debts due and liabilities incurred by a Stool prior to the commencement of this Ordinance ;

(j) In general for the proper control and regulation of the Stool Treasuries. 10

GOLD COAST COLONY
No. 5 OF 1945.

AN ORDINANCE TO AMEND FURTHER THE ASAMANGKESE DIVISION
REGULATION ORDINANCE.

Date of Commencement
Short title

(7th April, 1945)

Amendment of Section 6(2) of principal Ordinance

1. This Ordinance may be cited as the Asamangkese Division Regulation (Amendment) Ordinance, 1945 and shall be read as one with the Asamangkese Division Regulation Ordinance (hereinafter referred to as the principal Ordinance), and all amendments thereto. 20

2. Subsection (2) of Section 6 of the principal Ordinance is hereby amended in the following respects :—

(a) by the insertion of the words “ save as is hereinafter provided ” after the word “ action ” in the second line of the subsection :

(b) by the substitution of a colon for the full-stop at the end of the subsection, and by the addition to the subsection of the following proviso :—

“ Provided that in any case where a claim in respect to a debt or liability alleged to have been incurred by or on behalf of the Stool before the commencement of this Ordinance has been the subject of an enquiry in accordance with any regulations made under this Ordinance, and the Governor upon consideration of the record of the enquiry and of any recommendation transmitted to him in connection therewith is in doubt as to whether or not any payment ought to be made in respect to the claim or any part thereof, or as to the amount which ought to be paid, the following provisions shall have effect :— 30

(i) The Governor, if he thinks fit, may refer the matter to the Executive Council for consideration as to whether or not it is desirable, in the interests of justice, that the claim or any part thereof, or the amount which ought to be paid, should be adjudicated upon in an action against the Stool :

10 (ii) where, upon any such reference, the Governor in Council considers it desirable that there should be any such adjudication, he may, in his absolute discretion and without assigning any reason, certify that in his opinion the circumstances are such that, notwithstanding anything in this Ordinance, the matter may properly be the subject of legal proceedings :

(iii) in any case where the Governor in Council has so certified, nothing in this subsection shall be deemed to preclude any court of competent jurisdiction from adjudicating upon the matter to which the certificate relates or to prohibit the issue or enforcement, after judgment, of execution against the Stool property or revenues."

Chapter 78

20 **ASAMANGKESE DIVISION REGULATION**
(COLONY)

SECTION 8.—ASAMANGKESE DIVISION TREASURIES REGULATIONS.

Nos. 10 of
1935 B40 of
1935

1. These Regulations may be cited as "The Asamangkese Division Treasuries Regulations", and shall apply to all Stool Treasuries established by the Governor under section 3 of the Asamangkese Division Regulation Ordinance.

Short title
and
Application
Cap 78

30 11. (1) For the purpose of ascertaining the debts and liabilities incurred by the Stool prior to the coming into force of the Ordinance the Treasurer of the Stool Treasury shall receive claims and enquire into the existence of such debts and liabilities, and upon the conclusion of such enquiry shall submit to the Governor for his approval particulars of such debts as may have been proved to his satisfaction and admitted by the Stool.

Existing
Stool debts

(2) It shall be the duty of any person on the request of the Treasurer of the Stool Treasury to declare the amount of any debt or liability of the Stool and to produce any evidence as to such debt as may be within his knowledge.

(3) No claim for debts existing prior to the commencement of the Ordinance shall be paid by the Treasurer of the Stool Treasury unless such debt has been first approved by the Governor.

GOLD COAST COLONY

*Regulation No. 77 of 1942.**21st November, 1942.*

Cap 78

REGULATIONS MADE UNDER SECTION 8 OF THE ASAMANGKESE DIVISION
REGULATION ORDINANCE.

Short title 1. These Regulations may be cited as the Asamangke Division Treasuries (Amendment) Regulations, 1942 and shall be read as one with the Asamangke Division Treasuries Regulations (hereinafter called the Principal Regulations).

Amendment of regulation 11 of 10 of 1935 2. Regulation 11 of the Principal Regulations is hereby amended as follows :—

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(a) by the substitution of a full stop for the comma after the words " the existence of such debts and liabilities " in sub-regulation (1), and by the deletion of all the words in sub-regulation (1) appearing thereafter ; and

(b) by the addition thereto immediately after sub-regulation (1) of the following sub-regulation :—

" (2) The Treasurer of the Stool Treasury shall transmit to the Governor the record of the proceedings at any enquiry held in pursuance of sub-regulation (1) together with any recommendation in respect thereto which he may think fit to make, and if upon consideration of the record and any recommendation the Governor is satisfied that the debt the subject of the enquiry or any part of such debt ought to be paid, he shall approve the same and direct the Treasurer of the Stool Treasury to make payment accordingly. " ; and

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(c) by re-numbering sub-regulations (2) and (3) as (3) and (4) respectively.

In the Privy Council.

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Defendants-Appellants

AND

JOHN EDMUND TURKSON

Plaintiff-Respondent

Case for the Appellants

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