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IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 59 of 1960

ON APPEAL FROM THE SUPREME COURT
OF THE FEDERATION OF MALAYA

B E T W E E N :-

CHAI SAU YIN

Appellant

- and -

LIEW KWEE SAM

Respondent

CASE FOR THE APPELLANT

1. This is an appeal from the Judgment and Order dated the 20th June 1959, of the Court of Appeal at Kuala Lumpur of the Supreme Court of the Federation of Malaya, dismissing the Appellant's appeal from the Judgment and Order dated the 27th November, 1958 of the High Court at Seremban of the Supreme Court of the Federation of Malaya, whereby it was ordered that Judgment for the sum of \$5,097.42 be entered for the Plaintiff (the Respondent) against the 2nd Defendant (the Appellant).
pp.25-35
pp.35 & 36
pp.13-19
pp.19 & 20

2. In this action the Respondent claimed the balance of the price of smoked sheet rubber sold and delivered to the following persons (the Defendants in the action), namely;

1. Yap Seow Leong,
2. Chai Sau Yin (the Appellant),
3. Eng Yong Ngi, and
4. Ang Yee Khoo -

trading under the style of Tong Seng Rubber Company.

The 1st and 3rd Defendants submitted to judgment, and the 4th Defendant was out of the jurisdiction and unserved, so that the action was tried throughout as between the Respondent and the Appellant.

3. The facts and issues in this case are summarized initially as follows. For many years the Malayan Rubber Industry, upon which the economic well-being of Malaya so largely depends, has been statutorily controlled. The relevant statutes for the purposes of this appeal are the Rubber Regulation Enactment, 1936 (No. 37 of 1936) which regulates the production, export and import of rubber, and the Rubber Supervision Enactment, 1937 (No.10 of 1937) which regulates all internal dealings in rubber and also makes provision for the collection of statistics concerning rubber cultivation. Under the Rubber Supervision Enactment, 1937 (hereinafter called "the Enactment") dealers in rubber are required to hold a licence and the purchase of rubber by any person who is not duly licensed is prohibited. Yap Seow Leong, the 1st Defendant in this action, began business as a rubber dealer in 1937 and held a licence to trade under the style of Tong Seng Rubber Company. Trading under that licence he had bought rubber from the Respondent, who was and is an owner of rubber land. After the war the 1st Defendant recommenced his business in 1945 and again took out a licence to trade under the style of Chop Tong Seng and Company and later Chop Tong Seng Rubber Company. On the 14th January, 1946, the 1st Defendant entered into a Deed of Partnership with eight other persons, including the Appellant and the 3rd and 4th Defendants. The Deed recited that the 1st Defendant was the holder of a rubber dealer's licence and provided that the partners should contribute specified sums to the capital of the partnership, of which the style or firm name was to be Tong Seng Rubber Company, and that the partnership should be managed by the 1st Defendant in consideration of a monthly salary. The Deed and the names of the partners were subsequently registered under the Registration of Businesses Ordinance, 1947, but no disclosure of the existence of the partners was made in the 1st Defendants applications for his dealer's licence, which continued to be issued in his name only. It appears that, except for the 1st Defendant, none of the partners took any active part in running the business or drew any profits from it. By 1951 when this action was begun five of the partners had registered their withdrawal from the business, and this action was brought against the remaining four persons whose names remained on the Business Register.

Ex.P.7
pp.42 & 43
Ex.D.5.
pp.45-50

Ex.D.8
p.p.38 & 39

The question to be decided on this appeal is whether, having regard to the provisions of the Enactment the sales to the Tong Seng Rubber Company were lawful or enforceable against the Appellant.

4. The provisions of the Enactment which are chiefly relevant to this appeal are as follows :-

"5.(i) Subject to the provision of section 13 no person shall purchase, treat, or store rubber or pack rubber for export unless he shall have been duly licensed in that behalf under this Enactment."

"11. A licence to purchase rubber may be issued by the Board and shall include the right to keep a place or places for the treatment and storage of rubber purchased under the licence. Such place or places shall be specified in the licence and are hereinafter referred to as the 'licensed premises'."

Sections 12 to 14 inclusive deal respectively with licences to treat and store rubber and licences to pack rubber for export.

"16.(i) Every licence shall be valid only for the place or places and purpose specified therein and shall expire on the thirty-first day of December of the year in respect of which it is issued.

(ii) No licence shall be assignable.

(iii) A licence is personal and, subject to the provisions of sub-section (iv), lapses and becomes void on the death, mental disorder or bankruptcy of the licensee.

(iv) In the case of the death, mental disorder or illness of a licensee, the Licensing Officer may by endorsement on the licence authorise any other person to exercise for the benefit of the licensee or of the estate of the licensee, as the case may be, the rights conferred by the licence until the expiration of the term for which it was originally issued or for any shorter period, subject to such conditions as the Licensing Officer may deem necessary.

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(v) For the purposes of this section 'mental disorder' means mental disorder as a result of which any Court has made any order under the Mental Disorders Enactment.

"17.(i) Two or more persons carrying on business in partnership shall not be obliged to obtain more than one licence appropriate to the circumstances in respect of which the licence is issued, and a licence to two or more persons shall not be determined by the death or retirement from business of any one or more of the partners.

(ii) When a licence is issued to two or more persons carrying on business in partnership, every such person shall be liable for the Acts and omissions of the other or others of them, unless the person charged with liability for the acts or omissions of his partner proves to the satisfaction of the Court that he acted bona fide and in no way directly or indirectly contributed to the breach of the provisions of this Enactment with which his partner is charged.

"18.(i) Whenever any person licenced under this Enactment would be liable under the provisions of this Enactment or of any rules made thereunder to any punishment, penalty, or forfeiture for any act, omission, neglect, or default, he shall be liable to the same punishment, penalty, or forfeiture for every similar act, omission, neglect, or default of any agent or servant employed by him in the course of his business as such licensed person unless he proves to the satisfaction of the Court that he took all reasonable means and precaution to prevent any breach of the provisions of this Enactment by his servant or agent.

(ii) Every agent or servant employed by a person licensed under this Enactment in the course of his business as such licensed person shall also be liable to every punishment, penalty, or forfeiture prescribed for his acts, omissions, neglects, or default contrary to the provisions of this

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Enactment or of any rules made thereunder as fully and effectually as if such agent or servant had been the person to whom the licence had been issued.

"19.(i) Every holder of a licence -

- (a) to purchase rubber;
- (b) to treat and store rubber which consists wholly or partly of rubber not grown or produced on land in the occupation of the licensee;
- (c) to store rubber which consists wholly or partly of rubber not grown or produced on land in the occupation of the licensee;
- (d) to pack rubber for export;

shall cause his licence to be framed and conspicuously exhibited on his licensed premises and shall cause the words 'licensed to purchase rubber' or the words 'licensed to treat and store rubber' or the words 'licensed to store rubber' or the words 'licensed to pack rubber for export' as the case may be, to be painted in conspicuous letters in English or Romanised Malay upon his licensed premises, to the satisfaction of the Licensing Officer."

Section 25 provides that no licensee shall receive any rubber except upon delivery of a written authority for its sale, treatment, storage or packing, and Section 26 provides that every dealer shall deliver to every person from whom he purchases any rubber a written memorandum containing specified particulars of the sale.

Section 20 provides that the wilful furnishing of false particulars constitutes an offence, and Section 31 imposes a fine of \$5,000 upon any person who commits an offence or makes default in complying with any obligation imposed upon him by the Enactment.

Section 32 gives power to make rules and declares that such rules when published in the Gazette shall have the force of law. The Rules in fact made under Section 32 contain in Schedule A

the form of application for a license to purchase rubber, which contains an entry space for the names of partners and their addresses, and in Schedule B the form of licence, which states that the names of partners, if any, are to be stated.

- pp.1-3 5. The Statement of Plaintiff in this action dated the 30th July, 1951 claims the balance due for rubber sold and delivered by the Plaintiff to the Defendants between January 1951 and the 12th June, 1951. An annexed statement of account showed how the amount claimed was made up and that the last sale took place on the 13th June, 1951. The Appellant had in fact on the 18th June, 1951 entered his name in the Register of Businesses as having withdrawn from the business on the 11th June, 1951, but as he had given no contemporary notice of this withdrawal to the Respondent it was conceded that, if he was liable at all, he was also liable in respect of the sales which took place on the 13th June, 1951. By his Statement of Defence dated the 31st August, 1951 the Appellant alleged that by the Deed of Partnership dated the 14th January, 1946 he purported to enter into partnership to carry on the business of rubber dealers on the licence of Yap Seow Leong (the 1st Defendant), that the said business was prohibited by law and the partnership was dissolved by law, that by virtue of the registration of the partnership agreement the Respondent had notice of such dissolution, that the Appellant had no knowledge of the transactions referred to in the Statement of Plaintiff and had not adopted any of them, that the rubber in question had been sold and delivered to the 1st Defendant personally trading under his licence, that if the sale was to a partnership it was illegal, and that the Appellant had not received any of the rubber or any benefit therefrom.
- pp.4 & 5
- pp.5-13 6. On the 13th November, 1958 the action was tried before Mr. Justice Smith. There was little or no material dispute about the facts. In the course of cross-examination the Respondent said that he knew he could only deal with a licensed dealer and that a licensed dealer must display his licence, but that he did not know that on the licence was written the name of the person licensed to deal. He further
- p.3
- Ex.P.6.
p.52
- p.7,
11. 4-8
- p.7. 11.
19 & 20

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stated that he knew that the 1st Defendant had no money to run his business and had taken in partners and that the 1st Defendant was the licensee and the Appellant a partner. In re-examination he said - p.7 11.42 & 43

"I sold rubber to Company not to 1st Defendant alone. I don't know if all partners were licensed." p.8 11.9 & 10

The 1st Defendant then gave evidence on behalf of the Respondent. He identified a statement of account dated the 13th June, 1951 which he had signed as managing partner of the Tong Seng Rubber Company and also a memorandum dated the 13th July, 1951 in the prescribed form setting out the last purchase of rubber from the Respondent on the 13th June, 1951 and also signed on behalf of the Tong Seng Rubber Company. This witness also identified the statutory form of application for a licence, his previous licences and the recognizances which he had entered into with two sureties. As to the Deed of Partnership he gave the following evidence: p.8. 11.35 & 36 p.9 11.3 & 4 p.9. 11.17 to 23

"I alone was to hold dealer's licence. It is written into agreement. That was important: I was the recognised dealer. I was to control: I was sole managing proprietor. I am now sole proprietor. Board says Tong Seng Rubber Company. Same Board throughout since 1945 and since 1947. Licence was exhibited in shop. They know I was rubber dealer. I was well known." p.9 11.24 to 33

He further stated that the Respondent had never asked him and he had never told the Respondent he had partners. p.10 11.12 & 13

The Appellant was the sole witness for the Defence. He stated that he entered into the partnership but that he had no personal knowledge of the transactions in question, got no benefit from them, and had paid no attention to the business. He said he could not remember, he might have said to the Respondent he was a partner. He said that he decided to leave when he was surprised to hear that most of the partners had left without telling him; he said that he was also advised that the arrangement was illegal. p.10,1.31 to p.11 1.4 p.11 11.24 to 27

p.14 ll.12
-15

p.16 ll.
16 to
28

p.17. ll.
20 to 23

p.17
ll.24
to 29

7. In his Judgment dated the 27th November, 1958 the learned Trial Judge held that Section 17 of the Enactment required that all the partners should have been named in the licence and that accordingly the partnership was not properly licensed under the Enactment. He considered, however, that the carrying on of the partnership in breach of the Enactment should be regarded in the same way as breach of a revenue law, and relying upon the authority of Brown v. Duncan (1829) 10 B. & C. 89 he considered that the Respondent was entitled to recover against all the members of the partnership. He then said that, if he was wrong in that view and the Enactment properly construed was one generally established for the protection of the public, he considered that the words of Lord Thurlow in Neville v. Wilkinson (1782) Bro. C.C. 543 and quoted in Osborne v. Williams (1811) 18 Ves. Jun. 379 were in point. The learned trial judge said:

p.17 ll.
29 to 38

"Lord Thurlow was dealing with the case of money paid for an illegal purpose and he appears to have thought that in all cases, where money was paid for an illegal purpose, it might be recovered back; observing, that 'if Courts of Justice mean to prevent the perpetration of crimes, it must be, not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state in which they were before'."

p.18 ll.4
to 7

The learned Judge was fortified in this view by some remarks obiter by Mellish, L.J. in In re South Wales Atlantic Steamship Company (1876) 2 Ch. D. 763 at p. 781.

8. It is respectfully submitted that the authorities relied upon by the learned Trial Judge have no application to the facts of this case in that in none of them was a direct attempt being made to enforce a contract declared illegal by statute, and further that the Enactment is not analogous to Acts designed purely for the protection of the Revenue or to the provisions and effect of the Companies Act, 1862.

9. The Court of Appeal unanimously dismissed the appeal of the Appellant but in their Judgment Thomson, C.J. and Neal, J. gave different reasons, Syed Sheh Barakbah, J. agreeing with the Judgment of Thomson, C.J.

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Thomson, C.J. appears to have dissented from the learned Trial Judge's view that the Enactment was analogous to a revenue law. He said that one purpose of the Enactment was to enable inspection and supervision by public officers of all dealers in rubber, and that another object was to ensure that only persons of good character engaged in dealing in rubber. He said that clearly one object was to protect to some extent the very large revenue derived from rubber, but that in his opinion the Enactment went further than this and he was quite prepared to accept the submission of the Appellant's Counsel that it was intended to ensure the orderly carrying on of an industry on which the prosperity of the country was to some extent dependent. The learned Chief Justice accordingly held that if the dealings which were the subject of the action were prohibited, the contract between the partners who engaged in them and therefore the partnership were unlawful, and also that in that event the contracts of sale were prohibited by law and could not be sued upon. He held, however, that the sales in question were not to the partners but to the 1st Defendant personally:

p.28 1.42
to p.29,
1.20

p.30, 11.
13 to 21

"It is very probable that the Plaintiff and indeed other vendors of rubber thought they were selling to the firm and it is equally probable that Yap and the other partners thought that it was the firm that was buying the rubber. This, however, is no more than an example of the legal error that is so prolific of litigation in this country that a partnership firm has a legal existence as distinct from that of the partners composing it. Putting aside for the moment the question of illegality what actually happened when rubber was sold was that it was sold to and bought by Yap as a partner and as agent of the other partners, with a resulting joint obligation on the part of them all to pay for it. When the rubber was delivered to Yap it became the joint property of the partners If these contracts were prohibited by law it could only be by reason of section 5 of the Enactment. 'No person shall purchase rubber unless duly licensed.' On the face of it the answer to the question 'Who purchased the rubber?' is 'Yap purchased the rubber.' And Yap was duly licensed. It is true that by reason of the partnership agreement what he did produced

p.29 1.44

p.30 1.22

p.31 1.40

certain legal results as to the property in the rubber and the obligation to pay for it. Nevertheless I am not prepared to think that these results can be held to make illegal purchases which on the face of them were not prohibited by the statute..... The only person who purchased rubber was Yap. If rubber had been purchased by any other partner then unless he held a licence of his own or was included in a joint licence issued under section 17 the transaction might well have been prohibited by law and is illegal. There was, however, no suggestion of any such transaction being either carried out or indeed contemplated."

10. It is respectfully submitted that this finding was not open to the learned Chief Justice either on the facts or in law. It is contradicted not only by all the documents exhibited at the trial, but also by the direct evidence of the Plaintiff as well as by his Statement of Plaintiff. Further, it is submitted that even if as a matter of law the contract of sale had been made with the 1st Defendant alone, the Appellant could not be rendered liable therefore except on the footing that the contracts created a partnership debt and were therefore transactions of the partnership.

pp.32
to 35

11. Neal, J. agreed with the learned Chief Justice and S.S. Barakbah, J that the appeal should be dismissed, but he based his Judgment on the view that under section 17 of the Enactment it was not necessary that each of the partners carrying on business as rubber dealers should either have a licence of his own or should be named in the licence of one of them. The learned Judge was of the opinion that the words in section 17(1) "appropriate to the circumstances in respect of which the licence is issued" refer, not to the type of licence, but to the terms of any partnership agreement. He found support for this construction in the wording of section 18, holding that the only kind of agent to which that section could refer must be a partner, but that if all partners were required to be named in the licence inclusion of the word "agent" in section 18 was superfluous.

p.34 11.
3 to 11

p.34 11.
41 to 48

12. It is respectfully submitted that this construc-

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tion is contrary to the plain and obvious meaning of section 17 of the Enactment when construed in relation to the other provisions thereof and the Rules made thereunder. It is submitted that section 17, when read in particular together with section 5 of the Enactment, requires that every person carrying on business in partnership must be licensed either by a licence issued in the names of all the partners or on a separate licence, that the words referred to by the learned Judge indicate the licence appropriate to the business, and that the use of the word "agent" in section 18 does not authorize agents to carry on the business of licensed dealers.

13. By Order of the Court of Appeal dated the 12th January, 1960 final leave was granted to the Appellant to appeal to the Head of the Federation of Malaya acting on the recommendation of the Judicial Committee of the Privy Council against the said Judgment and Order of the Court of Appeal.

pp.36
& 37

14. The Appellant respectfully submits that this appeal should be allowed, that the said Judgments of the High Court and the Court of Appeal should be set aside and that this action should be dismissed for the following among other

R E A S O N S

1. Because the purported purchase of rubber by the Tong Seng Rubber Company contravened the provisions of the Rubber Supervision Enactment, 1937 and was therefore void or unenforceable for illegality.
2. Because the Tong Seng Rubber Company was an illegal partnership in that it purported to carry on business in contravention of the provisions of the Rubber Supervision Enactment, 1937 and therefore the purported sale of rubber to the partnership was void or unenforceable for illegality.
3. Because there was no contract between the Appellant and the Respondent for the sale of rubber and in any event any such contract

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would have been void or unenforceable for illegality.

4. Because the Appellant is not liable under contracts made by the 1st Defendant to the extent that such liability would render him a participant in an illegal act or illegal course of business or illegal partnership.

JOSEPH DEAN