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Judgment
4/1964

IN THE PRIVY COUNCIL

No. 35 of 1962

ON APPEAL FROM
THE FIJI COURT OF APPEAL

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
22 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

NATHANIEL STUART CHALMERS
(Defendant) Appellant

78522

- and -

THE FIJI KISAN SANGH
(Plaintiff) Respondent

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CASE FOR THE APPELLANT

Record

1. This is an Appeal from a Judgment and Order of the Fiji Court of Appeal, dated the 14th June, 1962, setting aside the Judgment and Order of the Supreme Court of Fiji, dated the 1st September, 1961, and ordering a new trial.

pp. 63, 67.

pp. 45, 49.

2. The Appeal arises out of a Suit brought by the Respondent (who will be referred to hereinafter as "the Plaintiff") against the Appellant (who will be referred to hereinafter as "the Defendant") claiming the sum of £3,752.15. 5d. as being the amount improperly drawn or misappropriated by the Defendant as sole trustee of the trust account known as the "Kisan Sangh Building Fund Account".

pp. 2-4.

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3. The Plaintiff is an Industrial Union duly registered under the Industrial Associations Ordinance.

4. As stated by the President of the Court of Appeal -

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"The circumstances giving rise to this litigation are somewhat involved and complicated and it is sufficient for the purpose of this Judgment if I summarise them as follows:

p.64, 1.29 to
p.65, 1.10.

Record

At the material time, i.e. between February, 1954, and April, 1957, the Defendant was the President of the Industrial Association called the Fiji Kisan Sangh which was registered under the Industrial Associations Ordinance. In this period funds were raised for the construction of a building, which funds were deposited in an account of the Bank of New South Wales at Lautoka under the title "Kisan Sangh Building Fund Account".

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The Defendant was given power by resolution of the Fiji Kisan Sangh to operate this account and it is alleged that he did so as trustee on behalf of the Fiji Kisan Sangh. After the Defendant ceased to be the President of the Fiji Kisan Sangh it was alleged that he had not accounted to the Fiji Kisan Sangh for all the moneys he had drawn from the account."

5. On the 7th April, 1959, the Plaintiff issued a Writ on the Defendant on the following endorsement:-

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p.2, 11.9-16.

"The Plaintiff's claim against the defendant is firstly for an account and repayment of all moneys improperly drawn by him from the plaintiff's Building Fund account with the Bank of New South Wales, Lautoka between the 19th day of February, 1954 and the 5th day of April, 1957 and Secondly for the return of the Rover 90 motor car Registered No. 7821."

6. On the 1st May 1959 the Plaintiff filed a Statement of Claim resting the case against the Defendant on breach of trust and abandoning the claim for an account.

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The relevant paragraphs are:-

p.2, 1.30 to
p.3, 1.26.

"3. AT all material times the Plaintiff had with the Bank of New South Wales Lautoka an account styled "Kisan Sangh Building Fund Account".

4. BETWEEN the 19th day of February, 1954, and the 18th day of April, 1957, the said Kisan Sangh Building Fund account was a trust account operated on solely by the Defendant as sole Trustee.

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5. THAT between the said 19th day of February,

1954, and the 19th day of April, 1957, on the said Building Account the Defendant drew the cheques full particulars whereof which exceed three folios are shown on the attached list delivered herewith.

- 10 6. THE Defendant has been requested by the Plaintiff to furnish an account of all moneys drawn by him from the said Building Fund Account but he had refused or neglected so to do and still so refuses or neglects to do so.
7. THE cheques listed in Part A of the said List were properly drawn and paid on account of the Plaintiff by the Defendant.
- 20 8. THE Plaintiff states that the said cheques listed under Part B and totalling the sum of £3,752.15. 5 were improperly drawn by the Defendant and the proceeds thereof applied by the Defendant for his own use or in payment of accounts not incurred authorised or approved by the Plaintiffs."

On the 19th May, 1959, the Defendant filed his Statement of Defence.

The Defendant admitted paragraphs 4 and 5 of the Statement of Claim and denied paragraphs 3, 6, 7 and 8.

p. 8.

7. On the 11th August 1960 the trial commenced before the Supreme Court of Fiji.

30 Counsel for the Plaintiff expressly informed the Court that the Plaintiff was not seeking an Order for Accounts but for recovery of moneys misappropriated by the Defendant.

p.53, 1.15.

The Plaintiff led evidence, oral and documentary. The Plaintiff did not call the General Secretary, Mr. Ayodhya Prasad, and the Accountant-Treasurer, Mr. M.D. Richmond.

As stated by the Courts below, the nature of the evidence called by the Plaintiff was of a "scanty nature".

40 At the close of the Plaintiff's case the Defendant submitted he had no case to answer.

Record
p.28, 1.1 to
p.29, 1.20.

The learned Trial Judge refused to rule on the submission of "no case to answer" and directed that an account be taken by a Special Referee to be appointed by the Registrar.

p.29.

Accordingly, an Order for Accounts was made by the Supreme Court on the 15th August 1960.

p.30.
p.32.

8. From the said Order for Accounts both parties appealed to the Fiji Court of Appeal.

p.34.

The Fiji Court of Appeal delivered its Judgment on the 3rd May, 1961, remitting the case to the Supreme Court to proceed with the hearing of the action upon the following direction:-

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p.35, 11.11-42.

"It is quite clear that this appeal is mis-conceived. There has in fact been no judgment in this case yet. The order made by the learned trial Judge was an interlocutory order from which no appeal lies to this Court without leave, and no such leave was sought or granted before the hearing.

We have heard Counsel for both sides on the matter and they have agreed that before an account is ordered in this case the trial Court should first arrive at findings of fact and determine the issues arising on the pleadings.

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In these circumstances we have granted leave to the appellant to appeal from the Interlocutory Order made in this case and make the following direction by consent.

The order of the learned trial Judge dated 15th August, 1960, directing inquiries into accounts and matters incidental thereto is set aside and the action is remitted to the court below for the learned trial Judge to proceed with the hearing of the action.

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We do not feel that an order for an account should be made unless and until the learned trial Judge has decided, after hearing all the evidence, whether the action was properly instituted; whether the defendant is accountable to the plaintiff Association; and whether he then considers such an order should be made.

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In dealing with the defendant's submission that he has no case to answer we have no doubt that the learned trial Judge will give consideration to the authorities on this point reviewed in the case of Young v. Bank & Ors. (1950) 2 K.B.D., 510."

The resumed hearing commenced on the 16th August, 1961.

10 The only witness called was Shiu Nath, the Assistant Secretary, who was called for further cross-examination and re-examination. The Plaintiff called no other witness.

9. The Supreme Court delivered its Judgment on the 1st September 1961. p.45.

20 The Supreme Court directed that an account be taken by a Special Referee to be appointed by the Registrar and the Plaintiff be entitled to "such amount if any, as the referee's report states has not been satisfactorily accounted for" by the Defendant. p.48, 1.24.

An Order in accordance with the Judgment was made on the 1st September, 1961. p.49.

10. From the said Order both parties appealed to the Fiji Court of Appeal. p.50.
p.55.

The Fiji Court of Appeal delivered two separate Judgments on the 14th June, 1962, by the President, Hammett J., and Marsack J. A dissenting Judgment was delivered by Trainor J.A. on the 28th May, 1962.

30 The majority Judgment held that a trial de novo be ordered before another Judge. The reasoning of the majority Judgment is in the passage following:-

40 "I have carefully studied and considered the whole of the pleadings in the case and the grounds of appeal and the record of the proceedings in the Court below and it appears to me that several of the issues raised in the pleadings have not yet been adjudicated upon nor have definite findings of fact been made thereon. This is in part due to the manner in which the pleadings have been drawn and to the scanty nature of the evidence called. p.65, 1.33 to p.67, 1.9.

Record

In my opinion the special referee to be appointed has been given insufficient directions as to the basis upon which the account ordered should be taken, and I do not consider it should have been left to him to decide whether or not the items of expenditure referred to him have been "properly" or "improperly" expended. To this extent I am of the view that the Defendant-Appellant is justified in complaining that the whole decision in the case was being left to the special referee to determine when taking an account, which Counsel for the Fiji Kisan Sangh has somewhat to my surprise, says he did not want. I say this in view of paragraph 6 of the Statement of Claim which reads:

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"6. The Defendant has been requested by the Plaintiff to furnish an account of all moneys drawn by him from the said Building Fund Account but he has refused or neglected so to do and still so refuses or neglects to do so."

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It appears to me that what was first sought of the Court below was a decision on the question of whether the Defendant was not only empowered to operate the Fiji Kisan Sangh Building Fund Bank Account but also on his own authority to direct the specific purposes for which such payments should be made and the amount of such payments and to whom they were to be made, or whether he could only make such payments as the Fiji Kisan Sangh by resolution of its Central Board under the provisions of its Constitution directed should be made. The question of whether any particular sum was properly or improperly expended by the Defendant depended upon findings as to both:

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(a) His authority to expend moneys; and

(b) The actual purposes for which they were expended.

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If, therefore, the learned trial Judge had directed that the special referee should merely inquire and report to him the purpose for which the items in List B had in fact been expended, I am of the opinion that such an

order might well have been a proper order to make in such an action as this.

Record

After giving the whole of the proceedings in this case careful consideration, and bearing in mind the fact that both sides have sought to have the order of the Court below set aside, I would accede to these requests.

10 In all the circumstances I am of the opinion that the ends of justice will best be met by setting aside the decision of the Court below and ordering trial de novo before another Judge."

The dissenting Judgment held that the case be remitted once more to the Supreme Court with the following directions:-

- "(a) to dismiss that portion of the respondent's claim pertaining to the motor car, with costs p.62, 11.11-25.
- 20 (b) to hear such evidence as the defendant may adduce in respect of the remaining items in List "B" with permission to the respondents to cross examine or call rebutting evidence
- (c) to order judgment for the party in whose favour there is a balance or in favour of the appellant if there is no balance
- 30 (d) to make such order as to costs (other than the costs of the dismissal of the respondent's claim in respect of the motor car) as he considers proper."

11. Accordingly, the Fiji Court of Appeal made an Order on the 14th June, 1962, setting aside the Judgment of the Supreme Court, dated the 1st September, 1961, and ordering a new trial. The relevant Rules of the Court of Appeal are set out in the Annexe hereto. p.67.

12. The Defendant obtained Leave to Appeal to Her Majesty in Council on the 17th July, 1962. p.70.

40 13. The Defendant humbly submits that the appeal be allowed with costs throughout on the basis of solicitor and client, and the Judgment of the Fiji

8.

Court of Appeal, dated the 14th June, 1962, be set aside and the Plaintiff's claim be dismissed with costs throughout for the following

R E A S O N

BECAUSE the Plaintiff went to trial on the issue of its choice; on that issue the Plaintiff failed, and by that failure the Plaintiff must abide.

S.P. KHAMBATTA.

MERVYN HEALD.

ANNEXE TO APPELLANT'S CASE

LAWS OF FIJI 1955 CONSOLIDATION

SUBSIDIARY LEGISLATION:

CHAPTER 3

SECTION 32 - COURT OF APPEAL RULES

PART II

CIVIL APPEALS

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15(1) The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the Supreme Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only and not without special leave of the Court. The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the judgment may be reversed or varied, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision.

(2) The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may be just.

16. If on the hearing of an appeal it shall appear to the Court of Appeal that a new trial ought to be had, it shall be lawful for the said Court, if it shall think fit, to order that the order, judgment or decision of the Supreme Court be set aside, and that a new trial shall be had.

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T.L. WILSON & CO.,
6, Westminster Palace Gardens,
London, S.W.1.