Privy Council Appeal No. 119 *of* 1929.

Arthur Wijetilaka - - - - - - - *Appellant*

v.

Don Edmund Ranasinghe - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JUNE, 1931.

Present at the Hearing :—
LORD BLANESBURGH.
LORD DARLING.
LORD THANKERTON.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a judgment and order of the Supreme Court of the Island of Ceylon dated the 30th April, 1929, reversing a judgment and order of the Judge of the District Court of Ratnapura, dated the 25th February, 1928. No appearance was made in this appeal by the respondent and the appeal was heard *ex parte*.

The appellant is a proctor in the Supreme Court, and has been practising in the District Court of Ratnapura for over twenty years, and the respondent is a landowner near Rakwana, a place to which the police court of Ratnapura itinerates.

On the 30th September, 1926, the appellant instituted the present suit against the respondent in the District Court of Ratnapura, claiming a declaration that the respondent is a trustee for him in respect of a half share of a leasehold interest in certain Crown land known as the Miyanaowita Tea Estate, and an account of the net income of the land and payment of a half share of such income ; he further claimed that the respondent should be ordered to execute an absolute conveyance and assignment of a half share of the leasehold or, alternatively, an assignment of

such half share as between himself and the respondent. The District Judge, after trial, made a decree in terms of the reliefs sought by the appellant, but this decree was reversed on appeal to the Supreme Court, and the suit was dismissed. The appellant appeals from the decree of the Supreme Court, and asks that the decree of the District Judge should be restored, but only in so far as it grants a declaration that the respondent is a trustee for him in respect of one half of the leasehold rights, as the respondent's financial position renders any further relief fruitless and the appellant's main interest now lies in the question of his credibility as a witness, as the decision of the case turns on the opposite and irreconcilable evidence given by him and the respondent.

Certain facts as to which there is no dispute may be conveniently set out. On the 1st February, 1924, a notice calling for tenders for a 10-year lease of the right to collect tea seeds on the Miyanaowita Estate appeared in the *Ceylon Government Gazette*; the tenders were to be lodged, along with a deposit of Rs. 50, with the Controller of Revenue in Colombo not later than midday on the 26th February, 1924. The respondent obtained a tender form, for which he paid Rs. 20, and obtained the signature of the two necessary sureties. The tender form was thereafter filled up by the appellant in the name of the respondent alone, and signed by the respondent at a meeting between them, most probably on the 25th February, 1924, the tender form being dated the 26th February, 1924; on the latter date the respondent went to Colombo and deposited the tender form.

The respondent's tender was accepted by the Crown on the 22nd March, 1924, and he was requested to attend at the Divisional Forest Office at Ratnapura, together with his sureties, on the 2nd April, 1924, for the purpose of executing the necessary bond on his lease, and to bring a sum of Rs. 50, being security on his lease, and Rs. 1206, being annual rent for the first year in advance. On the morning of the 2nd April, 1924, the respondent attended as requested at the Divisional Forest Office at Ratnapura, and paid the sum of Rs. 1,256 by a cheque drawn by a Chetty in Colombo, from whom the respondent had obtained it the previous day at Colombo. Subsequently, on the 5th May, 1924, the formal lease by the Crown in favour of the respondent was executed, and the respondent entered upon and worked the land. It was provided by the lease that the lessee's obligations and rights thereunder should not be assigned or otherwise transferred or sublet without the consent of the Tender Board, previously obtained in writing.

Further, it was not in dispute that on the 2nd April, 1924, the respondent saw the appellant at his house in Ratnapura, and that the latter paid him in cash a sum of Rs. 638 (being one half of the first year's rent, the deposit of Rs. 50 and the cost of the tender form, Rs. 20), in respect of which the respondent gave the appellant a receipt in the following terms :—

" Arthur Wijetilaka,
" Proctor.
" Ratnapura,
" 2nd April, 1924.

" I, the undersigned, Don Edmund Ranasinghe of Rakwana, have this day received from Mr. Arthur Wijetilaka the sum of Rs. 638—agreeing to give him a half share of all the rights that I have secured from Government in leasing the right to collect tea seeds from Miyanaowita Estate for the period of ten years.

" D. E. Ranasinghe.
" 2.4.1924."

This receipt is entirely in the respondent's handwriting.

The appellant's story is that, having seen the *Gazette* notice inviting tenders, he formed the idea of tendering for the lease, as he needed tea seeds for some tea land he already owned; that he met the respondent at Rakwana Rest House, and, knowing that he owned some tea land in the district, asked him if he would obtain the necessary information about the land, to which the respondent agreed; that about ten days or a fortnight later the respondent gave the appellant the information, and that they then agreed verbally that they should take jointly from the Crown a lease of the Miyanaowita land, and that the respondent should act on behalf of both in taking all steps necessary to secure a lease of the land and in managing the property when the lease was obtained, that, in accordance with the agreement the respondent brought the tender form to be filled up by him, and, on the 2nd April, 1924, between 7.30 and 8.30 a.m., he paid the respondent the sum of Rs. 638, before the latter went to the Forest Department, and that the respondent himself drafted and wrote out the receipt while the appellant was out of the room for the purpose of fetching the money.

The respondent's story was that, in December, 1923, having ascertained that the Miyanaowita Estate was lying vacant, he approached the District Forest Officer with a view to leasing it; that the Forest Officer promised to let him know if the land was to be leased; that in February he received a copy of the *Gazette* notice calling for tenders for a lease; that he obtained a tender form and took it to the appellant to be filled up; that, his tender having been accepted, he paid the Forest Department Rs. 1,256 on the morning of the 2nd April, 1924; that in the evening of that day he went to the appellant's office to pay him his professional fee of Rs. 10 for his assistance in drawing up the tender; that the appellant then for the first time suggested that he should have an interest in the lease; that, under pressure from the appellant he consented to give the appellant a half share in the benefits of the lease, and accepted the sum of Rs. 638; and that the receipt was written out by him at the dictation of the appellant. The respondent maintained that such agreement was made by him for no consideration and was obtained by undue influence on the part of the appellant, whom he had employed from time to time during the past twelve years as his legal adviser and proctor. He further maintained that, if there

was any agreement such as that alleged by the appellant, it was unenforceable in that it was not contained in a notarially attested instrument, or, alternatively, that it constituted an agreement for partnership, which the appellant was prevented from proving by Ordinance No. 7 of 1840.

There is accordingly an irreconcilable difference between the evidence of the appellant and that of the respondent. The learned Trial Judge accepted the evidence of the appellant and rejected that of the respondent so far as it was in conflict with the appellant's evidence. The learned Judges of the Supreme Court preferred that of the respondent and held that the appellant had not proved his case.

In such circumstances a Court of Review should be slow to differ from the opinion of the Trial Judge as to credibility, in respect that he has seen and heard the witnesses, and should not differ without convincing reasons. In their Lordships' opinion there is not adequate reason for disturbing the conclusions in fact arrived at by the Trial Judge, and it will be convenient to deal with the criticisms made by the learned Judges of the Supreme Court on those conclusions.

First, as to whether the appellant had formed the idea of taking a lease of the Miyanaowita land in February, and communicated it then to the respondent. The appellant now admits, as proved, that the respondent had made enquiries about the land in December, 1923, and had a copy of the *Gazette* notice sent to him, and the learned Judges of the Supreme Court consider that this is inconsistent with the appellant's evidence; but the appellant's evidence is as follows :—" Defendant did not indicate to me or say anything to show that he had heard of the notification. He gave me the impression that it was for the first time that he was hearing the news from me. He made no suggestion that he should join me in the adventure." The respondent's own description of his habits of reserve in regard to such matters renders it quite probable that he would not disclose his previous steps in the matter.

The learned Judges next comment on the appellant's evidence that on the 2nd April he gave the respondent the Rs. 638 in cash, as he understood that the latter was going to make the deposit in cash at the Katcheri, whereas, in fact, it was all made by the one cheque, and consider that it is more probable that the cash payment was made after the deposit, as stated by the respondent. In their Lordships' opinion, while this point might affect the balance of considerations, it is not necessarily inconsistent with or destructive of the appellant's story, and, in their Lordships' opinion, it is quite insufficient to outweigh the other difficulties of accepting the respondent's evidence.

With regard to the interview with the respondent at Rakwana Rest House on 14th February, 1924, alleged by the appellant and denied by the respondent, it is not impossible that the appellant was there on the 14th and returned to Ratnapura

on learning that the case was to be taken at the latter place, and as regards the Rest House books, these do not appear to have been regularly kept, and, in any event, it is possible that the appellant may have returned to Ratnapura on the evening of the 14th February. This point, again, is one which, on balance of considerations, weighs against the appellant, but is not necessarily contradictory or destructive of his story.

The crucial point of the case, however, arises in the conflict as to whether the interview between the parties on the 2nd April, 1924, took place before or after the respondent's visit to the Forest Office to pay the deposit of Rs. 1,256. In the first place the receipt is in the respondent's handwriting, and their Lordships agree with the Trial Judge that its internal evidence is wholly out of keeping with the respondent's story that it was dictated by the appellant, a skilled lawyer. In the second place Akbar J., states that the words of the receipt flatly contradict the appellant's case, but their Lordships find themselves unable to agree with this view, for—the document being written by a layman—the phrase " the rights I have secured " may well have referred to the fact that the respondent's tender had been acepted. Thirdly, the only reason suggested by the respondent for a visit by him to the appellant in the evening of the 2nd April was the payment of a fee of Rs. 10 for his professional assistance in filling up the tender form, but there is no trace of this fee having been charged or paid, and it was not taken into account in the calculation of the Rs. 638. In their Lordships' opinion these considerations against the respondent's story more than outweigh the consideration as to the payment of the whole deposit by cheque, and, above all, the considered opinion of the Judge who saw and heard the witnesses is of vital importance on this crucial episode.

It remains to say that the respondent's subsequent actings afford, *quantum valeant*, corroboration of the appellant's story, for, when asked for an account of his management, the account rendered by him, after some delay, proceeded on the basis that the parties were jointly interested, and Lyall Grant, J., observes " One must add, however, that the evidence given by the defendant in respect of certain subsequent transactions which have little bearing on the relevant facts, is such as to disincline one to believe his unsupported testimony." It might have been added that the story of the appellant as to these subsequent transactions is corroborated in certain material particulars by the witness Dharmaratne.

Their Lordships see no reason to assume, as the learned Judges of the Supreme Court appear to have done, that the Trial Judge gave unjustifiable weight, either consciously or unconsciously, to the fact that the appellant was a tried and experienced lawyer, who often appears before him.

Accordingly, their Lordships are of opinion that the appellant has proved the agreement alleged by him, and that he paid half the deposit in terms of the agreement, for, if it be accepted that the

sum of Rs. 638 was paid to the respondent before he made the deposit, it matters not that the latter chose to pay the whole deposit by cheque.

Their Lordships agree with the Trial Judge's conclusion that the appellant was not employed by the respondent as his lawyer to fill up the tender form, and that there was no evidence of undue influence having been exercised by the appellant; indeed, the appellant's story having been accepted, there is no room for the suggestion that the appellant persuaded the respondent to give him an interest in the transaction.

In their Lordships' opinion the respondent is a trustee of the lease for the benefit of the appellant and himself in equal shares as tenants in common, and they agree with the Trial Judge that the appellant is not prevented from maintaining the action by reason of Ordinance No. 7 of 1840. The case appears to fall directly under Section 84 of the Trusts Ordinance No. 9 of 1917.

Accordingly their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the Supreme Court, dated the 30th April, 1929, should be recalled in so far as it dismisses the action with costs, and that it should be declared that the respondent is a trustee of the lease for the benefit of the appellant and himself in equal shares as tenants in common, the appellant to have the costs of the appeal and of the proceedings in both the lower Courts.

In the Privy Council.

ARTHUR WIJETILAKA

v.

DON EDMUND RANASINGHE.

DELIVERED BY LORD THANKERTON

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