Privy Council Appeal No. 27 of 1953

Nagammai Achi and another – – – – – – *Appellants*

v.

A. R. L. Lakshamanan Chettiar – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH MAY, 1957

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD TUCKER
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD SOMERVELL OF HARROW]

This is an appeal from a judgment of the Supreme Court of Ceylon setting aside a judgment of the District Court of Galle whereby the respondent (defendant) was ordered to pay to the plaintiff, since deceased, certain sums with interest. By Order in Council dated 17th March, 1955, the present appellants were substituted for the deceased plaintiff. In this judgment the original plaintiff will be referred to as the deceased appellant.

The deceased appellant was a money lender resident in India and having a branch of his business in Ceylon. That branch was managed up to 28th January, 1933, by the respondent, who held a Power of Attorney from the deceased appellant.

One Samaranayake was a debtor of the Ceylon business. He died and in 1929 the respondent obtained a decree in the District Court of Galle against his executor for Rs.8,618.20 with interest and costs.

I. M. S. Alles was another debtor of the Ceylon business. On 1st January, 1931, the respondent obtained from him a promissory note for Rs.7,000 with interest at 12 per cent.

The decree was obtained by and the note made payable to A. T. K. P. L. M. Letchumanan Chettiyar. The initials are those of the deceased appellant's firm or business and the name, though differently spelt, is that of the respondent. It was not suggested that there was anything irregular in this use by the respondent of his own name.

On the 25th January, 1933, the respondent by an instrument in writing assigned the decree to one Alagappa. The assignment recited that Rs.2,695 of the judgment debt had been already paid by the judgment debtor. This was true and that sum had been accounted for by the respondent to the deceased appellant. It also recited that the respondent had received Rs.3,000 as consideration for the assignment. According to the respondent this was not true. He said that he received no payment.

On or about the same date the respondent endorsed and delivered the note to Alagappa, also, according to his evidence, without any payment. The respondent left Colombo on or about 28th January, 1933, Sinniah being appointed as his substitute.

Between 1933 and 1938 Alagappa recovered Rs.5,706.81 on the decree. Alles had died and on 3rd October, 1934, his executor paid Rs.8,500. No part of these sums reached the deceased appellant or his then agent in Ceylon.

The deceased appellant's case was that the assignments were fraudulent and made in order that Alagappa might recover the monies for the respondent in fraud of the deceased. The respondent's main answer was that he received express instructions in writing from the deceased appellant to assign the decree and endorse and deliver the note to Alagappa.

The deceased appellant gave evidence accepted by the learned trial judge that he had not heard of these transactions and the recovery of the monies until 1942. The plaint was issued in July of that year.

Before the District Court the respondent challenged the jurisdiction of the Court. That failed and is not pursued before the Board.

The first question, apart from jurisdiction, was whether fraud was established. The learned trial Judge held that it was. The respondent then pleaded a discharge in writing dated 28th April, 1934, when books and accounts were handed over. That defence was not relied on before the Board. The respondent further pleaded that the causes of action were prescribed under the Prescription Ordinance (Legislative Enactments of Ceylon, Vol. II, c. 55). In answer to this plea the deceased appellant alleged that the period in the Ordinance did not begin to run until 1942 as there had been "concealed fraud", or alternatively because the respondent was a Trustee within the Trusts Ordinance (Legislative Enactments of Ceylon, Vol. II, c. 72) which by section 111 makes the Prescription Ordinance inapplicable in certain cases of which, it was said, this was one.

The Supreme Court set aside the order of the District Court on the ground that the learned Judge had misdirected himself.

There was no dispute as to many of the relevant facts. The following is a summary of the learned trial Judge's findings.

The debt from Alles was a good debt. Owing to his death it was expected in 1932 that it would take a year or two years to collect. The slump had affected Ceylon and a number of debts were in effect irrecoverable. The deceased appellant instructed the respondent to write off bad or irrecoverable debts. On or about 5th December, 1932, the debt due from Alles was written off as if it had been an irrecoverable debt and ceased to appear in the books. The Samaranayake debt was also, as the respondent admitted, a good debt. That debt also disappeared from the ledger balances sent to the deceased appellant at or about the end of December, 1931.

But for the subsequent assignment of the decree and delivery of the note, the documents, that is the decree and the note, would have remained in the files of the branch.

As has been stated the respondent alleged that the deceased appellant had given him express written instructions to write off the debts, to assign the decree and endorse and deliver the note. The deceased appellant denied that he had given any such instructions.

The learned Judge in a careful judgment considered the probabilities as well, no doubt, as the impression made on him by the witnesses. He refers to a letter, the terms of which he thought supported the deceased appellant. The respondent himself had said that the deceased appellant personally did not know his clients in Ceylon which would make it unlikely for him to refer to two particular debtors. He considered at

some length the position of Alagappa, who was related both to the deceased appellant and the respondent. On the one hand he found that the deceased had asked Alagappa to exercise some degree of supervision over his affairs in Ceylon. He also had in mind that Alagappa already owed the deceased appellant a large sum of money and it was therefore unlikely that he would be chosen by the deceased appellant as an assignee for no consideration. He also considered the respondent's failure to call Alagappa, who had according to the respondent's evidence, himself brought one of the letters of special instructions.

Their Lordships have thought it right to refer in a little detail to the consideration given to the matter by the learned Judge in view of the ground on which the Supreme Court set aside his judgment and then held on the evidence that fraud was not established.

The Supreme Court held that the learned trial Judge had placed the burden of proof in regard to fraud on the defendant. This was based on the following sentence in the judgment:—

> "It is admitted that the defendant assigned the Samaranayake decree and assigned Alles note to Alagappah Chetty. That being so the burden rests on him to prove that he did so at the instance of the plaintiff."

Read in its context in a judgment in which the evidence and probabilities are carefully weighed the effect of the sentence is not in their Lordships' opinion as stated in the Supreme Court. The learned Judge was not speaking of the burden of establishing fraud on the evidence as a whole which plainly rests on the plaintiff. He was dealing with one issue of fact in the light of admitted facts and documents. Apart from the defence of express instructions the learned Judge may well have held that only one conclusion was possible on the fraud issue. The deceased appellant had denied express instructions and in those circumstances it was for the respondent to establish express instructions unless the verdict was to go against him. When the word onus is used in this sense it may well be desirable to make this clear. It is a dangerous word. Their Lordships are, however, satisfied that the learned Judge's conclusion that no express instructions had been given was based on a consideration of the evidence as a whole and not on any misapplication of the law as to onus of proof on an issue of fraud.

There being therefore no misdirection the issue was clearly one of fact for the trial Judge who saw the witnesses. The various points which in the opinion of the Supreme Court raised a doubt were points which were open to be taken before the learned trial Judge and most if not all of them are expressly referred to by him. There was ample evidence on which the learned trial Judge could come to the conclusion as he did that the respondent fraudulently converted to his own use the note and the decree.

Turning to the defence based on the Prescription Ordinance, the learned trial Judge held that there was "concealed fraud" down to 1942 applying the principle originally established in the Courts of Equity in this country but applicable in all Courts since the Judicature Act (*Gibbs* v. *Guild* 9 Q.B.D. 59). The application of the principle as part of the law of Ceylon was in accordance with precedent. In *Dodwell & Co. Ltd.* v. *John*, 18 N.L.R. 133, the question was whether the time for prescription could be extended by "concealed fraud" as against a defendant who had got no benefit from the fraud. There was a difference of opinion on this point in Ceylon but all the Judges proceeded on the basis that the principle of concealed fraud was part of the law of Ceylon. The case came before this Board, *Dodwell & Co. Ltd.* v. *John* [1918] A.C. 563. The issue was considered in the light of English equitable principles and of the views held by Roman lawyers "on whose system the law of Ceylon is founded" (p. 574). Lord Haldane who delivered the judgment of the Board treated the English equitable principles as applicable but thought it relevant to refer to the Roman law.

In *Punchi Hamine* v. *Ukku Menika* (28 N.L.R. 97), the judgment in *Dodwell & Co. Ltd.* v. *John* was treated as deciding that the equitable principles were applicable in Ceylon. In *Dodwell & Co. Ltd.* v. *John,* 18 N.L.R. 133 at p. 141, Pereira, J., said, " This Court has often pointed out that our Courts (in Ceylon) are Courts of Law and Equity, and it would be quite in order to give here the same relief as is given in England in cases of fraud ". As the basis of Ceylon law is Roman Dutch law the generality of the first part of this sentence may require qualification. That can be dealt with if and when it arises but there are no grounds for doubting the application by the Courts of Ceylon of the equitable principle of concealed fraud in the present case. Counsel did not suggest otherwise.

The next question is whether the learned trial Judge was right in finding that there was here a concealed fraud. In *Balli Coal Mining Coy.* v. *Osborne* [1899] A.C. 351, this Board rejected the argument that it was necessary to establish some independent act of concealment in cases where the tort was itself done furtively so that its commission would be concealed. " Two men acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot free at the end of a limited period rather than the other (*loc. cit.* p. 364)." On the facts here, in particular the entries or absence of entries in the books there was ample evidence on which the learned Judge could find " concealed fraud."

Sinniah, who succeeded the respondent as manager, gave evidence. He said he was not aware of the assignment. The learned Judge doubted this ; he thought he was aware of the assignment. He added, " But that does not import knowledge to the plaintiff."

It is possible that, in a case of concealed fraud, facts might come to the knowledge of an agent not himself a party to the fraud ; that these facts might be such that the agent's knowledge would be imputed in law to the principal ; and that the principal who in fact knew nothing might find himself precluded from relying on the " concealment " as preventing the prescription period running. Such a case would want very precise findings of fact and it is sufficient to say here that no point based on Sinniah's alleged knowledge is taken in the respondent's case.

There was no suggestion that the deceased appellant was guilty of laches in not discovering the fraud before 1942. The defence under the Prescription Ordinance therefore fails.

This makes it unnecessary to consider the appellant's alternative submission under the Trusts Ordinance.

Although the proceeds were not traced to the respondent there was no dispute as to the quantum of the learned trial Judge's judgment on the basis that he was right as their Lordships have held on the various issues.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed and the judgment of the District Court restored. The respondent must pay the appellants' costs of this hearing and of the appeal to the Supreme Court.

(39030) Wt. 8075—17 100 6/57 D.L.

In the Privy Council

NAGAMMAI ACHI AND ANOTHER

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DELIVERED BY
LORD SOMERVELL OF HARROW

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