Privy Council Appeal No. 125 *of* 1915.

Duport and Jones - - - - - *Appellants,*

v.

Grieve and Company - - - - - *Respondents,*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR EGYPT.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD STRATHCLYDE.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR WALTER PHILLIMORE, BART.]

This appeal is from His Britannic Majesty's Supreme Court for Egypt. The appellants John Hunter Jones and Edward Harry Day are the partners in a firm of Duport and Jones carrying on business in Egypt. They sued as plaintiffs under their firm name, as they were entitled to do under the rules governing the procedure in this Court, which resemble those of the Supreme Court of Judicature in England, and they made defendant a supposed firm of Grieve and Co. There is no difficulty about the constitution of the plaintiff firm; but serious questions arise as to the character and component members of the supposed defendant firm. The writ of summons was served upon Etherington William Buckley and Herbert Milton, who appeared as defendants in Egypt, and who are the respondents in this appeal. So far as their Lordships are informed it was not served upon any other person.

No form of appearance is prescribed by the Rules, and none is set forth in the record, so that the character in which the defendants appeared has to be ascertained from their pleaded defence to which reference will be made hereafter.

The claim of the plaintiff firm against the defendant firm was on three causes of action, first for £ E. 1,000 and interest thereon as money paid upon a consideration that failed, or

alternatively for the same sum as damages for breach of agreement, or in the further alternative as damages for false representation; secondly and thirdly for sums of £ E. 1,022 and £ E. 1,042 paid under guarantees given at the request of the defendant firm and interest thereon.

The false representations were said to have been made by one Allan Ferguson Joseph, said to have been a partner in the defendant firm.

They were in substance that the greater part of a certain property, known as the Fadlab Estate in the Sudan, was under cultivation; that the whole was about to be resold on advantageous terms; and that a company with limited liability was about to be formed in which the plaintiff firm should receive shares for double the amount of the cash advanced.

It was pleaded that all these representations were untrue, and further, that the plaintiffs, in lieu of shares in a limited company, had been given certificates or share warrants in an undertaking purporting to be a limited partnership which did not exist, so that the share warrants were worthless, and the consideration for the payment of the £ E. 1,000 wholly failed.

The defendants, in the course of a long defence, denied the alleged false representations, and denied that the plaintiff firm had advanced or paid money upon the representations alleged. They stated that they, Andrew Richardson Grieve, Allan Ferguson Joseph, and others, had associated themselves for the working of the Fadlab Estate, which was vested in Grieve, and were contemplating the formation of a company or société; that the plaintiff firm desired to acquire an interest in the adventure, and finally agreed to put in the sum of £ E. 1,000, on condition of receiving two shares for each £ E. 1; and that the object was attained by the constitution of a "société en commandite par actions," called Grieve and Co., in which the plaintiff firm was entered as a shareholder for the due amount.

Anticipating a point, which the plaintiffs had not precisely made in their statement of claim, but which proved to be an important part of the plaintiffs' case, they averred that the société was legally constituted, and that the plaintiffs were estopped from denying the validity of its incorporation.

As to the guarantees, they said in substance that these and other guarantees given by other members of the société had been given at the request of the société.

They denied that they had been or were partners in any firm of Grieve and Co. other than the société, in which they and the plaintiff firm were all shareholders. They denied that there had ever been any firm or partnership of Grieve and Co. other than the société.

They submitted that Grieve, as the active partner and manager of the société, was the person upon whom service of the writ ought to have been made, and they said they delivered their defence as persons served with the writ, but without prejudice to their submission that the writ had not been

properly served, and that the plaintiffs were not entitled, as against them "or as against any partnership, firm, or société in which they are interested." to any of the relief claimed.

The material dates in the case are the 24th March, 1910, on which date the plaintiffs said that the untrue representations which induced them shortly afterwards to advance the £E. 1,000 were made; the 10th May, 1910, the date of the agreement purporting to constitute the société; the 6th August, 1910, and the 31st March, 1911, when the several guarantees were given; the month of March 1912, when the payments were made under them; and the 6th August, 1912, when the writ was issued.

The trial took place upon documentary and oral evidence, including expert evidence before his Honour Judge Cator and a jury. It began on the 10th March, 1915, and lasted eighteen days. At the close the jury were asked certain questions, and their answers were that no statements of an untrue nature were made, that the plaintiffs put the sum of £E. 1,000 into the "old" venture as part proprietors with the intention of subsequently receiving two shares of £E. 1 each in the company that was to be formed for each 1*l.* they had paid in cash; that the parties interested in the Fadlab Estate on the 24th March, 1910, were Grieve, Joseph, the two defendants, the plaintiff firm, and certain other persons named Russell, Carton de Wiart, Foote, and Mrs. Bewley; and that the persons interested in the Fadlab Estate on the 24th March, 1910, considered that they were proprietors jointly liable.

On these findings the judge reserved further consideration, and ultimately delivered judgment on the 9th April.

The judgment or order recites the answers of the jury and proceeds as follows:—

> And this Court, being of opinion that the plaintiffs' claim for shares was satisfied by the allotment and delivery of 1,000 shares of 4*l.* each in Grieve and Co., and that the plaintiffs' claim in respect of moneys paid under the guarantees referred to in the statement of claim is a claim against Grieve and Co., and that Grieve and Co. being constituted under the provisions of the Egyptian mixed codes is an Egyptian company, and that consequently this Court has no jurisdiction to enter judgment against Grieve and Co. in respect of the moneys so paid,
>
> This Court doth order that this action do stand dismissed, and that the plaintiffs do pay to the said Herbert Milton and Etherington William Buckley their costs of this action to be taxed as between party and party, such taxation to be on the footing that each of them is entitled to separate costs up to the date of the delivery of the statement of claim, and that thereafter they should be jointly entitled to one set of costs.
>
> And liberty is reserved to the plaintiffs to apply to this Court for judgment against Grieve and Co. in respect of moneys paid under the guarantees in the statement of claim mentioned in the event of the Mixed Tribunals of Egypt hereafter declaring that Grieve and Co. is of British nationality.

It is from this judgment that the present appeal is brought. There is no cross-appeal. The appellants ask that the judgment

be reversed, and that judgment be entered for them or that a new trial may be ordered.

At the Bar an elaborate argument was offered in explanation of the fact that no application for a new trial had been made in Egypt and to establish the proposition that the application for a new trial was properly made in the first instance to this Board. It becomes unnecessary, however, for their Lordships to express any opinion upon this point, as it appeared somewhat early in the course of the argument that there were no grounds for granting a new trial.

The point principally relied upon was a supposed irregularity in the proceedings of the learned Judge, who after the jury had been charged, and while they were considering their verdict, went upon the request of the jury to their room and there in private answered a question put to him on a point in the case.

This was an unusual act; but their Lordships are relieved from considering whether it was actually irregular, or, if irregular, such an act of irregularity as to require or warrant a new trial, because the learned Judge upon reflection took immediate steps to cure any mischief that might have been done, and because the counsel for the parties were given a further opportunity to address the jury before any answers were returned, and acted so as to waive any possible irregularity.

After their Lordships, in the course of the argument of counsel for the appellants, had intimated their opinion upon this point, counsel admitted that there was no other ground upon which they could hope to get a new trial.

The findings of the jury therefore stand. These findings do not exhaust the case; but they completely dispose of the case as to false representation, and, coupled with the well-warranted finding and holding of the learned judge, that the plaintiffs' claim for shares was satisfied by the allotment and delivery of 1,000 shares of 4*l.* each in Grieve and Co., they dispose of the other grounds upon which the plaintiffs sought to recover the first £ E. 1,000.

The real struggle has been upon the claims in respect of the guarantees.

These guarantees were given and have been discharged by the plaintiffs. The question is upon whose request they were given.

The plaintiffs say that they gave the guarantees upon the request of Grieve and Co. This still leaves it uncertain what they mean by Grieve and Co., or, to put it in another way, who are the persons who they say were the partners in Grieve and Co. One thing is clear: they do not by Grieve and Co. mean the société. Their case is that there was, and is, no société, because no such société could legally exist.

The question whether the société had been legally constituted, and could be deemed to exist in law, was much disputed, and expert evidence was given on both sides.

According to the law administered by the Mixed Tribunals in Egypt, there may be formed several kinds of partnership or association, one of which is a "société en commandite." This has a "nom social" under which it may be sued; a "gérant," or manager, who is the proper person to be served with process; partners "associés," with unlimited liability; and others called "associés commanditaires," who are only responsible for the amount which they have contributed or promised to contribute to the funds of the société.

A partnership in these exact terms is unknown to British law; and as it was agreed that all the persons who purported to constitute the société were British subjects, it was contended on behalf of the plaintiffs that the société must be deemed not to have been formed, or not to be a legal entity. On the other hand, it was said that all the parties were resident in Egypt, and could effect *inter se* any association which the law of Egypt permitted. This was the view taken by the learned Judge. But if it was a legal entity, then it was an Egyptian entity, and an action against it by British subjects would have to be tried by the Mixed Tribunals. This is the explanation of the reservation in the judgment. Their Lordships find it unnecessary to decide whether this view was right or wrong.

The point, though evidently much insisted upon by both sides, does not seem to them one which need be determined in order to arrive at a right conclusion upon this appeal.

The Grieve and Co. which the plaintiffs are suing as the body at whose request they gave the guarantees must be composed in one of three ways. Either (1) it must be the société. Or (2) it must be a partnership composed of those persons who endeavoured to make themselves into a société, but failed for legal reasons. These persons would include the plaintiffs. Or (3) it must be a partnership consisting of persons other than the plaintiffs.

If the first view be the right one, the plaintiffs fail. They admit—indeed, they assert—that they are not suing the société.

The third view of the fact is that with which the plaintiffs, as appears by the correspondence, set out, and which was their main if not only case at the trial.

In support of it they relied upon the use of the word "syndicate" in some of the documents, maintaining that this word pointed to the existence of another organisation side by side with the société. The truth, however, is that the same body was meant and that the words are used loosely. Possibly, as the word "syndicate" is frequently used for a promoting body and there was a proposal to form a British limited company, the members not unnaturally described their société as in this sense a syndicate.

However this may be, the case that there was a Grieve and Co., consisting of persons other than the plaintiffs and existing side by side with the société, after the 10th May, 1910, at the request of which the guarantees were given, was negatived by the verdict of the jury.

There remains only the second view, that the Grieve and Co., at whose request the guarantees were given, and which is being sued in this action, is a partnership consisting of those persons whom the jury mentioned in their answer, that is, the defendants, the plaintiffs, and others.

This is the view which Counsel for the appellants ultimately presented to their Lordships.

Assuming the contention to be open to his clients, it comes to this, that they are suing their own firm, or are suing themselves and others under the convenient formula of the firm, not to have the partnership accounts taken, but to recover as if they were strangers for a money debt.

Further, owing to the form of writ and the mode of service, it would happen, if they succeeded in getting judgment, that questions arising between the partners would be settled in the absence of some of the members of the partnership.

It would be contrary to the general principles of partnership law, and it might work grave injustice if such a suit were to be entertained.

It is attempted to be supported by reliance on Order XLVIII A, rule 10, of the "Rules of the Supreme Court of Judicature in England," which it is said is now incorporated into the procedure of the Supreme Court for Egypt by its rule 334.

Rule 10 of Order XLVIII A is in the following terms :—

The above Rules shall apply to actions between a firm and one or more of its members, and to actions between firms having one or more members in common, provided such firm or firms carry on business within the jurisdiction, but no execution shall be issued in such actions without leave of the Court or a judge, and on an application for leave to issue such execution all such accounts and enquiries may be directed to be taken and made, and directions given, as may be just.

The Egyptian rule which is relied upon is as follows :—

The Rules of the Supreme Court of Judicature in England do not apply in the Ottoman dominions, but where the local practice is in doubt regard may be had in the discretion of the Court to the practice and procedure of the High Court and other Courts in England.

This rule was framed under the powers given by the Ottoman Order in Council of 1910, which, in pursuance of the Egypt Order in Council of 1915, has become applicable to the newly-established Court in Egypt, from which this appeal is brought.

Though it has been in existence since 1891 there is no recorded instance of the application of the English rule 10. Probably if it ever comes to be applied in practice it will be found that, however wide is its language, the cases to which it can be usefully applied are limited. It is conceivable that it

might be usefully applied if one partner had a claim in damages against his firm, as, for example, for dismissal from a salaried post, which it would be convenient to assess severally and primarily, the sum fixed being then brought as an item into the partnership accounts.

Whatever may hereafter prove to be the construction of the English rule 10, their Lordships cannot accept the contention that the Egyptian rule 334 warrants such an application of the English rule as to make it possible to support this action as one by a partner against himself and the other members of the partnership.

Lastly, it was suggested by the appellants' counsel that they might treat this action as one in the nature of an action for contribution, in which they could recover against the two defendants who have appeared their several contributions as members of the partnership towards the plaintiffs' claims. But, assuming that there could be such an action, this suit was not framed for this purpose. These defendants have had no opportunity of meeting the claim, and there are not sufficient materials for a decision.

From every point of view it appears to their Lordships that this action was misconceived, and was rightly dismissed by the Judge in the Court below.

Their Lordships will therefore humbly recommend His Majesty that this appeal be dismissed with costs.

In the Privy Council.

DUPORT AND JONES

v.

GRIEVE AND COMPANY.

DELIVERED BY

SIR WALTER PHILLIMORE, BART.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON

1917.