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3, 1951

No. 49 of 1948.
31138

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.
15 JUL 1953
FROM THE WEST
INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL
 AFRICAN COURT OF APPEAL (GOLD
 COAST SESSION).

BETWEEN

KOFI SUNKERSETTE OBU - - - - - *Appellant*
 (Defendant)

AND

10 A. STRAUSS AND COMPANY LIMITED by their
 Attorney ROBERT SIMMONS - - - - - *Respondents*
 (Plaintiffs).

Case for the Respondent.

RECORD.

1. This is an Appeal from a Judgment of the West African Court of Appeal (Gold Coast Session) dated the 13th December 1947 which affirmed the judgment of Smith J. sitting at a Divisional Court at Kumasi dated 23rd October 1945.

2. Before the learned trial judge the Respondents (Plaintiffs) claimed, after Amendment allowed:—

20 (A) £365 8s. 4d. owing by the Appellant (Defendant) on his personal account. p. 7, ll. 29-41.

(B) £6,838 18s. 11d. balance owing by the Appellant on general account. p. 23.

(C) A declaration that two leases obtained by the Appellant were entered into on behalf of the Respondents and that the Respondents were entitled thereto.

The Appellant counterclaimed—

(i) for an account to be taken of all the rubber shipped by him and payment of any balance found due to him; and

30 (ii) for commission on all rubber purchased by him for the Respondents.

3. The learned judge entered judgment for the Plaintiffs (Respondents) for £375 8s. 4d. on the Personal Account and £729 7s. 0d. on the General (or Building) Account and also for the Respondents on the Appellant's Counterclaim with costs assessed at £51 11s. 0d. p. 13, ll. 19-24.

p. 23, ll. 39-44.

4. In his reasons for judgment, the learned judge corrected an error in his judgment amending the figure of £375 8s. 4d. to £365 8s. 4d. and set out, inter alia, the following findings :—

p. 23, ll. 30-33.

(A) The relationship of the parties was governed by an Agreement dated the 19th April 1943 under which the Appellant acted as the Respondent's Agent in the purchase and shipment of rubber upon the terms therein prescribed.

p. 24, ll. 34-35.

(B) That there was nothing in this Agreement which obliged the Respondents to account to the Appellant.

p. 24, l. 36.

(C) The Appellant was obliged by the Agreement to account 10 to the Respondents.

p. 23, ll. 34-37.

(D) That the Appellant's own accounts clearly showed that the amount of £365 8s. 4d. on the Personal Account was owing to the Respondents.

p. 24, ll. 1-7.

(E) That on the general (or building) account the Appellant's own account showed a heavy deficit, and that the general impression which the evidence gave him (the judge) was that the Appellant had not properly applied or accounted for all the moneys which he had received from the Respondents or on their account.

p. 24, ll. 19-22.

(F) That after making certain allowances the Respondents 20 were entitled to judgment on this part of their claim for £729 7s. 0d.

p. 24, ll. 24-32.

(G) That the Respondents were not entitled to the declaration claimed.

(H) That paragraph 6 of the agreement, providing for the Appellant's Remuneration, clearly stated "a commission is also to be paid to me by the Company which I have agreed to leave to the discretion of the Company."

p. 24, ll. 40-42.

(I) That nothing is stated (in the agreement) as to the basis upon which this commission, if given, is to be calculated, whether on total value of rubber shipped or on profits, or in any other way. 30

p. 24, ll. 43-47.

(J) That the evidence showed the Respondents had suffered a substantial loss in their dealings with the Appellant.

p. 25, ll. 1-4.

(K) That the evidence as a whole revealed the Appellant as a plausible rogue, full of grand promises which he did not fulfil and that he (the Judge) could find no justification whatever for holding that the Respondents ought to have exercised their discretion in the Appellant's favour.

p. 26, l. 36.

5. In their reserved judgment of the 13th December 1947 the said Court of Appeal held, inter alia :—

p. 15, ll. 21-24.

" Although this appeal is from the judgment it is clear from the 40
" Appellant's affidavit in support of conditional leave to appeal and
" from the grounds of appeal in the notice filed, that the appeal now
" before the Court, with one exception, is only as to the Appellant's
" Counterclaim which was dismissed. The one exception is as to
" the following supplementary ground of Appeal :—

pp. 20-21.

' That the Plaintiff Company not being locally registered in the Gold Coast could not bring the action and therefore have no locus standi in the suit.' "

6. The Respondents submit that the said Court of Appeal were right in so holding and that this Appeal is in effect only an appeal against the dismissal of the Appellant's Counterclaim, not only because of that but also because the Appellant's Petition of Appeal states that the Appeal is against the judgment of the said Court of Appeal.

7. The said Court of Appeal also held, inter alia :—

10 (A) That it was clear from the correspondence that the Appellant and his solicitor dealt on the footing that Simmons was the Respondents' agent and Attorney, through whom they (the Respondents) sued, and further that the Counterclaim filed by the Appellant before issue joined was directed to the Respondents by their Attorney Robert Simmons, Kumasi. p. 27, ll. 20-26.

(B) That Simmons' statement on oath that he held the Respondents' Power of Attorney remained unchallenged throughout the proceedings in the Court below. p. 27, l. 32.
p. 6, l. 31.

20 (C) That therefore this point, taken for the first time on appeal, could not be sustained, because if the objection had been raised at the proper time they, the Court of Appeal, had no doubt that the authority of the Respondents' agent would have been produced and duly proved. p. 27, l. 34.

(D) That before the agreement the Appellant's right to account was no stronger than after the agreement, but that the relationship between the parties was on the evidence exactly the same as after the agreement. p. 28, ll. 28-32.

(E) That, although it is stated in general terms in 1 Halsbury Hailsham Edn. p. 268 that an agent is entitled to an account, where the parties have made an express contract the agent's right to an account and the conditions under which that right will arise must be ascertained by reference to the terms of the contract. p. 28, ll. 7-13.

30 (F) That there was nothing in the agreement between the parties which obliged the Respondents to account to the Appellant. p. 28, ll. 5-7.

(G) That the case of *Harrington v. Churchward* (1860) 29 L.J. (Ch.) 521 was distinguishable because there the servant was by the terms of the agreement to receive a salary in proportion to the profits of the venture, and that in order to ascertain his remuneration an account had to be taken ; whereas in this case it was clear from the agreement that the Appellant was a servant and not a partner and that there was no provision for a share of profits.

(H) That the sum of £50 monthly was reasonable remuneration. p. 29, ll. 20-21.

40 (I) That though the words in the agreement " to cover my personal and travelling expenses " were ambiguous the Court was satisfied on a construction of the document that this was payment for the Appellant's services.

(J) That (after considering the Reported Cases set out in their judgment) the absence of any rate of commission or basis of pp. 28-29.
p. 29, ll. 26-29.

calculation clearly left it to the honour of the Respondents and the said Court of Appeal did not think the Respondents in all the circumstances disclosed in this case were open to criticism in resisting the claim.

p. 29, ll. 30-31.

(κ) That the appeal failed and should be dismissed with costs assessed at £33 15s. 6d.

p. 41, ll. 30-39.

p. 42, l. 25.

p. 48, ll. 33-34.

8. Prior to the agreement of the 19th April 1943 it is submitted that the correspondence discloses that by a telegram dated 28th June 1942 the Respondents by way of an invitation to treat offered to pay the Appellant " all reasonable expenses " as remuneration, and by a telegram of 29th June 1942 the Appellant proposed by way of offer a figure of £50 as his personal monthly expenses which offer was accepted by the Respondents by their telegram of 14th July 1942. 10

9. In the premises it is submitted that at no time prior to the 19th April 1943 was there any agreement between the parties as to the payment of any commission at all.

10. By the Agreement of the 19th April 1943 the Appellant agreed, inter alia, as follows :—

p. 79, l. 13.

1. That I will faithfully serve . . . in the capacity of Agent in the business of purchasing manufacturing and exporting rubber in and from the Gold Coast for the account and to the order of the Company aforesaid . . . 20

p. 79, l. 23.

2. To keep accounts of all dealings and transactions in connection with the said business and to produce such accounts to the Company's auditors whenever required by the Company and/or its Agent or Agents and further whenever required by the Company to draw up a Copy of such Accounts and deliver the same to the Company or as it shall direct.

p. 79, l. 34.

5. All advances which the Company has made to me up to the present totalling £5,250 and may make hereafter . . . are acknowledged by me and account thereof will be rendered to the Company . . . 30

p. 79, l. 41.

6. The Company has agreed to remunerate my services with a monthly sum of £50 to cover my personal and travelling expenses for the time being which I have accepted. A Commission is also to be paid to me by the Company which I have agreed to leave to the discretion of the Company.

p. 80.

p. 87.

p. 92, ll. 30-42.

p. 95, ll. 34-36.

11. The Respondents paid the Appellant the said sum of £50 monthly until the 31st December 1944, but as and from the 1st January 1945 paid him £20 monthly until termination of his employment on the 31st May 1945. 40

p. 6, ll. 35-36.

12. The Respondents did not pay the Appellant any commission because, amongst other reasons, he did not do enough business.

13. The Respondents respectively submit that this appeal should be dismissed for the following amongst other

REASONS

- 10 (1) BECAUSE it was rightly found by the learned trial judge that the Respondents were entitled to £365 8s. 4d. as money owing to them on the Personal Account and to £729 7s. likewise on the General Account.
- (2) BECAUSE it was rightly found by the learned trial judge that there was nothing in the Agreement of the 19th April 1943 which obliged the Respondents to account to the Appellant, but that by the said Agreement the Appellant was obliged to account to the Respondents.
- (3) BECAUSE it was rightly found by the learned trial judge that there was no justification whatever for his holding that the Respondents ought to have exercised their discretion as to paying commission in the Appellant's favour, and that therefore the Counterclaim was rightly dismissed.
- 20 (4) BECAUSE it was rightly held by the West African Court of Appeal (Gold Coast Session) that the Appellant's Appeal was against the dismissal of his counterclaim save as to one ground, to wit, that the Respondents had no locus standi and could not therefore bring an action as they were not locally registered.
- 30 (5) BECAUSE it was rightly held by the said Court of Appeal that as the witness Simmons' statement on oath that he held the Respondents' power of attorney remained unchallenged throughout the proceedings in the Court of first instance the point as to jurisdiction being taken for the first time on appeal could not be sustained.
- (6) BECAUSE the said Court of Appeal rightly dismissed the Appellant's Appeal against the dismissal of his counterclaim.
- (7) BECAUSE the evidence discloses that until the 19th April 1943 no commission at all was in law payable to the Appellant.
- 40 (8) BECAUSE where the parties have made an express contract for remuneration, the amount of remuneration and the conditions under which it will become payable must be ascertained by reference to the terms of that contract, and no implied contract can be set up to add to or vary such terms.

- (9) BECAUSE the judgment of Vaughan Williams L.J. in *Loftus v. Roberts* 18 T.L.R. 532 at p. 533 is correct and therefore there is here no contract to pay commission on which an action could be brought at all.
- (10) BECAUSE the promise to pay a commission is illusory being dependent on a condition which reserves an unlimited option to the Respondents.
- (11) BECAUSE the Respondents exercised their option or discretion in good faith and the Appellant on the merits was not entitled to any commission. 10
- (12) BECAUSE the alleged contract to pay commission is void for uncertainty, nothing being stated therein or elsewhere as to the basis upon which this commission, if given, is to be calculated.
- (13) BECAUSE the promise to pay commission is one which the parties did not intend to create a legal relationship but at best was binding in honour only.
- (14) BECAUSE the case of *Harrington v. Churchward* (1860) 29 L.J. (Ch.) 521 is also distinguishable as in this case the Appellant (Obu) was to receive a fixed salary for which no account was necessary to determine the amount payable. 20
- (15) BECAUSE there was no ambiguity in the Contract as to the salary of £50 which was to be the Appellant's remuneration to include his personal and travelling expenses.
- (16) BECAUSE for other good and sufficient reasons the decision of both the said Courts is right.

W. A. FEARNLEY-WHITTINGSTALL.

PATRICK EASTON.

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(Defendant)

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**A. STRAUSS AND COMPANY
LIMITED** by their Attorney
Robert Simmons - - *Respondents*
(Plaintiffs).

Case for the Respondent

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