Privy Council Appeal No. 8 of 1954

George Hanoman - - - - - - - - - - *Appellant*

v.

Archibald Rose - - - - - - - - - - *Respondent*

FROM

THE WEST INDIAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1954

Present at the Hearing:
LORD OAKSEY
LORD KEITH OF AVONHOLM
MR. L. M. D. DE SILVA
[*Delivered by* LORD KEITH OF AVONHOLM]

This action which comes before their Lordships' Board from the West Indian Court of Appeal has taken an unfortunate course. Their Lordships are not concerned to discuss the merits of the action which have not been considered by the Court of Appeal and will confine their attention to what is relevant to the procedural issue which has led to the present appeal.

Matters started with a writ of summons issued from the Supreme Court of British Guiana, dated the 19th December, 1947, by which the respondent claimed against the appellant (*a*) an injunction restraining the appellant from impounding any cattle or other animal the property of the respondent while grazing on any part of certain land known as Plantation Susannah and (*b*) 1,500 dollars damages for his having between certain dates wrongfully and unlawfully seized or taken possession of 10 head of cattle the property of the respondent and caused them to be impounded. From the statement of claim it appears that the respondent was the owner of two lots of land in the Western half of Plantation Susannah and the appellant was alleged to be at all material times the beneficial owner and occupier in possession of the Eastern half of the Plantation. The respondent claimed under his titles to be entitled to graze his cattle over the whole of the Eastern half of the Plantation occupied by the appellant and this was denied by the appellant. For the purposes of this appeal their Lordships find it unnecessary to go into the grounds on which this claim was asserted or denied or the limitations which the appellant pleaded in the alternative on the right claimed by the respondent, if the latter was found to have any right of pasturage over the Eastern half of Plantation Susannah. It is necessary, however, to note that the appellant counter-claimed for (1) a declaration that the respondent's titles did not confer on him any right of grazing as claimed and two further declarations in the alternative limiting the exercise of the right of grazing; (2) 500 dollars damages for trespass; (3) an injunction to restrain the respondent from continuing or repeating the trespasses; (4) further or other relief; (5) costs. Further procedure followed, after considerable delay, in the course of which the respondent gave notice that he would base his claim also on a prescriptive title and ultimately by amended statement of claim dated 18th May, 1951, he claimed (*a*) an injunction restraining the appellant from impounding any cattle or other animal the property of the respondent while grazing on the Eastern half of Plantation Susannah; (*b*) a declaration that he had

acquired a prescriptive right to depasture his cattle on the Eastern half of the said Plantation (*c*) payment by the appellant of 1,500 dollars as damages for the appellant's wrongful and illegal acts ; (*d*) costs.

At this point their Lordships would refer to a matter with reference to the appellant's title which played considerable importance in the course ultimately taken by the West Indian Court of Appeal. While the appellant claims to be the beneficial owner and occupier of the Eastern half of Plantation Susannah and to have been in possession thereof since the 25th June, 1947, he had not when the action was raised and has not yet obtained from the vendors, Bookers Demerara Sugar Estates Limited (hereafter referred to as Bookers) a transport (i.e. a formal conveyance) of the land. This was known to the respondent before he started his action. The position is clear from two letters passing between the advisers for the respective parties. The first from the respondent's adviser to the appellant's solicitors is as follows:—

10th December, 1947.

Messrs. Cameron & Shepherd.
2 High Street, Georgetown.

Dear Sirs.

Referring to my conversation with your Mr. Edward de Freitas as regards the proposed transport by Messrs. Booker Bros. McConnell & Co., Ltd., to Mr. G. Hanoman of the portion of Pln. Susannah Rust, Courantyne, Berbice, sold to him and with respect to which Mr. de Freitas promised to furnish me with the date of the agreement of sale. I shall be glad if I may be informed of this as early as possible: and if, as I also understand, Mr. Hanoman has not only already paid the purchase price of the property in full but has also been put in possession, I shall also be glad if you will now confirm these facts and so avoid any necessity for joining Messrs. Booker Bros. McConnell & Co., Ltd., in an action that Mr. A. Rose and others propose to take against Mr. Hanoman for certain acts of trespass committed by him.

I remain,
Yours faithfully,
Eustace G. Woolford.

The appellant's solicitors replied as follows:—

Georgetown, Demerara,
British Guiana.
16th December, 1947.

Sir Eustace G. Woolford, K.C., O.B.E., Barrister-at-law,
Chambers, Charlotte Street, Georgetown.

Dear Sir,

Re: E.½ Pln: Susannah.

With reference to your letter of the 10th inst., our client, Mr. George Hanoman, has instructed us to inform you that he purchased the E½ of Plantation Susannah from Messrs. Bookers Demerara Sugar Estates, Ltd., on the 25th day of June, 1947, that having paid the full purchase price he was given immediate possession of the same and that he has been in possession since then.

Mr. Hanoman has also instructed us to say that there will be no need to join Messrs. Bookers Demerara Sugar Estates Limited in the action which you say Mr. A. Rose and others propose to take as that Company has no beneficial interest whatsoever in the above-mentioned property.

Yours faithfully,
Cameron & Shepherd.

At the hearing before the trial judge a submission was made by junior counsel for the respondent that the counterclaim was bad because Bookers were not a party ; but when his leader agreed with appellant's counsel that the correspondence showed that no point was to be taken that the appellant did not have his transport in implementation of his contract of purchase from Bookers the submission was withdrawn.

After evidence and a hearing lasting 26 days Acting Chief Justice Boland in a long and careful judgment, in which he considered all the issues between the parties, on the 18th September, 1951, dismissed the claim of the respondent (the plaintiff) ; entered judgment for the appellant (the defendant) on his counterclaim, with 200 dollars damages for the trespass by the respondent's cattle on the Eastern half of the Plantation Susannah ; made a declaration that, neither by virtue of transport, nor by virtue of prescription, was the respondent entitled to the servitude of grazing his cattle on the Eastern half of the Plantation Susannah ; and granted an injunction against the respondent, his servants, or agents, from causing or permitting cattle to graze on the Eastern half of the said plantation.

Against this judgment the respondent appealed to the West Indian Court of Appeal. When the appeal came on for hearing the Appeal Court raised a preliminary point that the proceedings were wrongly constituted, because the defendant (the present appellant) was not the registered proprietor of the Eastern half of Plantation Savannah. Proceedings were adjourned for consideration of this point by counsel. On resumption of the hearing the point was adopted by counsel for the plaintiff (the present respondent), while counsel for the defendant argued to the contrary and further submitted that, in any event, the Court could direct that the registered proprietors, Bookers, should be served with notice of the appeal, if the Court thought they should be parties to the proceedings, pursuant to Rule 5 (1) of the West Indian Court of Appeal Rules, 1945. This course, however, the Court of Appeal did not take. On the 14th November, 1952, on this preliminary point, the Court dismissed the appeal ; adjudged the action in the Supreme Court of British Guiana to be dismissed ; set aside the judgment of Acting Chief Justice Boland on the counter-claim ; and ordered that no costs be allowed to either appellant or respondent in the Supreme Court, or in the Court of Appeal.

The ground on which the Appeal Court proceeded was that the proper parties were not before the Court. What the plaintiff was claiming was a real or praedial servitude and the action they held should have been directed against the owner of the servient tenement. According to the law of the Colony, they said, the term proprietor connotes legal owner and does not include beneficial owner. The judgment of the Court of Appeal contains the following passage:

> " According to the law of this Colony, the term proprietor connotes legal owner and does not include beneficial owner. A transport of immovable property vests in the transferee full and absolute title therein and it is not lawful for any person in whom title of such property vests to transfer it except by passing and executing a transport. See *Parikan Rai and La Penitence Estates Co : Ltd*—vs—*Douglas*, 1926 L.R.B.G. 142, where reference is made to the earlier case of *Gangadia*—vs—*Barracot*, 1919, L.R.B.G. 216, where it was held that it is still necessary to complete a sale by transport.
>
> The action in this case proceeded by the consent of counsel on both sides on the basis that the transfer from Bookers Demerara Sugar Estates Ltd., to the defendant had been implemented by transport and as if the defendant was, in fact and in law, the proprietor. The action was based upon a complete misconception of the legal position of the defendant. The proceedings were started and were continued upon that basis from which the trial judge was led by both parties to arrive at an erroneous conclusion as to their position.

> It is manifest therefore that if judgment had been given on the claim for the plaintiff it would have been of no value as the owner, i.e. the proprietor of the alleged servient tenement was not before the Court and the judgment given in favour of the defendant on the counter-claim in so far as it relates to the declaration and injunction is of no value as the defendant was not at the time and is not now the owner of the servient tenement."

Later in the judgment it is said:

> "We are not unmindful of the fact that the original cause of the action was the alleged trespass of the plaintiff's cattle on the tenement of the defendant; that question was never pursued at the trial. Whether the entry of the cattle was or was not a trespass is so inextricably interwoven in the case as presented with the existence or non-existence of the servitude claimed that we are of the opinion that until the question of servitude be considered with the proper parties before the Court the judge should have declined to decide the question of trespass or no trespass."

In taking the course which they did the Court of Appeal proceeded on the authority of certain cases which their Lordships will examine in a moment and which in their Lordships' view have no application to the circumstances of this case. Their Lordships would however first mention two matters. It was maintained for the appellant before their Lordships' Board that the relevant law of the Colony in the matter of ownership of the alleged servient tenement was the common law of England applicable to personal property, by virtue of section 3 (D) of the Civil Law of British Guiana Ordinance, and that, as the appellant was put in possession of the Eastern half of Plantation Savannah and had paid the full purchase price, the legal owner was no more than a trustee for him and the appellant was entitled to be treated as having the whole substantial right and interest of an owner to contest this action. This contention was not, however, fully developed and argued and it is not clear that it was advanced before the Court of Appeal, or considered there. Their Lordships are not prepared to express any opinion in this matter without having the views of the Courts of the Colony in a case more appropriate to raise the question and on a fuller examination of the provisions of the Ordinance and of any relevant authorities. They would only observe that as the appellant appears to have the real interest to dispute the servitude it would be unfortunate if any technicalities as to his legal title should stand in the way. The other observation which their Lordships would make is that sufficient weight, on any view, does not seem to have been given by the Court of Appeal to the fact that the defendant was a necessary party to the action, and indeed the only proper party, so far as the claim for an injunction and damages for impounding the plaintiff's cattle was concerned. Equally the plaintiff was a necessary party to the counterclaim for trespass and damages. These claims may have been inextricably interwoven, as the Court of Appeal, observes with the existence, or non-existence, of the servitude claimed and may have made it necessary, if the servitude was in dispute, to add another party to the action; but the omission of such party from the action could not, in their Lordships' view, make the action fundamentally bad. The authorities relied on by the Court of Appeal lead, in their Lordships' view, to no such result.

Fausett and Anor. v. *Mark,* (1943) L.R.B.G. 354, was a case where a plaintiff sued certain persons in the supposed character of executors, claiming, *inter alia,* that they should be ordered to pass transport of certain property to himself. The trial judge made this order. An appeal was taken by the unsuccessful defendants. The point was then taken by the plaintiff and sustained by the Court of Appeal that the defendants were not executors of the deceased to whom the property had belonged and so had nothing to convey. In these circumstances the Court of Appeal dismissed the action without costs to either side. There could be no question of adding another party in this case. The defendants had no

title to the property at all and were the only persons who had been asked and refused to convey the property to the plaintiff. As matters then stood there was no *lis* to be litigated between the plaintiff and any other persons. The way in which the plaintiff could obtain transport of the property was necessarily dependent on considerations which could have no relation to the circumstances on which that action was based, and might never give rise to the necessity of an action at all. The action was from the beginning wrongly conceived and could not be corrected by the addition or substitution of any other party. The passage quoted by the Court of Appeal from the judgment in that case was apposite to the facts of that case, but, in their Lordships' opinion, has no application to the circumstances of the present appeal. *Sun Life Assurance Company of Canada* v. *Jervis*, (1944) 60 T.L.R. 315, is another case which is plainly distinguishable from the present case. By the time parties in that case got to the House of Lords there was no subsisting *lis* between the parties The respondent had obtained the relief sought in his action in the Courts below and by the terms imposed by the Court of Appeal in granting leave to appeal to the House of Lords could not be deprived of that relief or of the costs whatever decision their Lordships reached, and was to get his costs of his appeal as between solicitor and client. The appellant accordingly was merely seeking a judgment on an academic question and that the House of Lords refused to entertain. So in *Glasgow Navigation Company* v. *Iron Ore Company* [1910] A.C. 293, and *Sutch* v. *Burns* [1944] 1 K.B. 406; (1944) 60 T.L.R. 316, where parties sought to obtain judgments on a set of suppositions, which were not in accordance with the facts, the actions were dismissed. In the former case Lord Loreburn, L.C., stated that it was not the function of a court of law to advise parties as to what would be their rights under a hypothetical state of facts.

None of these decisions, in their Lordships' view, touch the present case. This is not a fictitious, or hypothetical case. It is not vitiated by a fundamental nullity as in *Fausett's* case. There is a real, substantial question to try directly affecting the rights of the appellant and the respondent. As regards the claims for an injunction and for damages they are the only possible parties, for it is their acts alone that are challenged. If the assertion or denial of a servitude right requires that Bookers should be made a party their Lordships see no good reason why this should not be done even at this late stage of the litigation. Nothing that has already been done could of course prejudice Bookers in the matter of pleading, leading further evidence, or otherwise, in any matter in which their interests are affected. Opportunity should accordingly, in their Lordships' opinion, be given to Bookers to intervene in the proceedings if they so desire.

In this connection their Lordships' attention has been directed to the Rules of Court, 1900, in force in the Colony, which do not materially differ from and in many instances are identical with the Rules of the Supreme Court in England. Rules 13, 14 and 15 of Order XIV of these Rules provide as follows:—

> "13. No action shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court or Judge to be just, order that the names of any parties improperly joined, whether as Plaintiffs or as Defendants, be struck out, and that the names of any parties, whether Plaintiffs or Defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. No person shall be added as a Plaintiff or as the guardian *ad litem* of a Plaintiff under any disability, without his own consent in writing

thereto. Every party whose name is so added as Defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice.

14. Any application to add or strike out or substitute a Plaintiff or Defendant may be made to the Court or a Judge at any time before trial, or at the trial of the action in a summary manner.

15. Where a Defendant is added or substituted, the Plaintiff, shall, unless otherwise ordered by the Court or Judge, file an amended copy of the writ of summons, and serve such new Defendant with such writ or notice in lieu of service thereof in the same manner as original Defendants are served."

By Rule 16 (1) of the West Indian Court of Appeal Rules, 1945, the Court of Appeal has all the powers and duties as to amendment and otherwise of the Supreme Court of the Colony. And under Rule 5 (1) of its Rules the Court of Appeal may direct notice of an appeal to be served upon any person not a party and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties.

In their Lordships' opinion, for the reasons already given, there was here a real issue raised by the action which vitally affected the two persons who were parties to the action and who in view of the injunctions and damages sought in the claim and counterclaim were necessary parties to the action. If it is necessary to prevent this action being defeated that another party should be joined as a party there exists ample power under Rule 13 of Order XIV of the Supreme Court Rules and Rule 5 of the West Indian Court of Appeal Rules to achieve this result and in their Lordships' view these powers should have been exercised by the Court of Appeal in the circumstances of the present case.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to recall the judgment of the Court of Appeal, to remit the case to the Court of Appeal with a direction to serve the note of appeal on Bookers Demerara Sugar Estates Limited and thereafter, subject to such further procedure as may be necessary and under reservation of all parties' rights and pleas, to hear and determine the appeal upon the merits. The respondent must pay the costs of the appeal to their Lordships' Board and the costs of the hearing which has already taken place in the West Indian Court of Appeal.

(39200) Wt. 8082—47 100 1/55 D.L.

In the Privy Council

GEORGE HANOMAN

v.

ARCHIBALD ROSE

[DELIVERED BY LORD KEITH OF AVONHOLM]

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1955