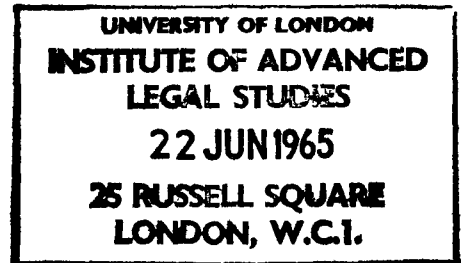


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Judgment
4/1964

IN THE PRIVY COUNCIL

No. 35 of 1962



ON APPEAL

from the Fiji Court of Appeal

78523

B E T W E E N :

NATHANIEL STUART CHALMERS (Defendant) Appellant

- and -

THE FIJI KISAN SANGH (Plaintiff) Respondent

CASE FOR THE RESPONDENT

1. This is an appeal by leave of the Fiji Court of Appeal from a judgment of that Court dated the 14th June 1962 whereby the Fiji Court of Appeal by a majority (Hammett, Acting President and Marsack J.A.; Trainor J.A. dissenting save as to costs) set aside the judgment given by the Honourable Mr. Justice Knox-Mawer on the 1st September 1961 in the action brought by the Respondent against the Appellant it was directed that an account be taken by a special referee and that the Respondent might

p.68
p.64
p.45

thereafter move for judgment against the Appellant for such amount, if any, as the referee's report might state had not been satisfactorily accounted for by the Appellant, and ordered that a new trial be had between the parties, making no order for costs in respect of such appeal.

2. The Appellant was at all material times, namely between February 1954 and April 1957, the President of the Industrial Association called the Fiji Kisan Sangh, which was registered under the Industrial Associations Ordinance and is the Respondent in this appeal.

3. During the period mentioned funds were raised for the construction of a building and these funds were deposited in an account at the Bank of New South Wales at Lautoka under the title "Kisan Sangh Building Fund Account". The Appellant was authorised by resolution of the Respondent to operate this account. It is alleged that he did so as trustee on behalf of the Respondent, and it is also alleged that he failed to account to the Respondent for all the monies that he had drawn from this account.

4. On the 7th April 1959 the Respondent

issued a Writ against the Appellant claiming p.1
 firstly an account and repayment of all monies
 improperly drawn by him from the Respondent's p.2,1.9.
 Building Fund Account with the aforesaid Bank
 between the 19th February 1954 and the 5th April
 1957, and secondly the return of a Rover motor car. p.2;1.14
 5. On the 1st May 1959 the Respondent delivered
 a Statement of Claim wherein the prayer was for, p.2
 inter alia,
 (1) The sum of £3,752.15s.5d. improperly drawn by p.4,1.1.
 the Appellant out of the said Building Fund
 Account or such lesser sum as the Appellant
 should be found to have improperly withdrawn
 or misappropriated from the said account, and
 (2) The return of the aforesaid motor car. p.4;1.7.
 A List of all cheques drawn by the Appellant
 on the said Building Fund Account during the
 aforesaid period was annexed to the Statement of p.4
 Claim and will be found in the Appendix hereto.
 Particulars of the cheques constituting the said
 sum of £3,752.15s.5d. were contained in Part B
 of this List. Part A of this List set out p.6
 particulars of all cheques properly drawn by the
 Appellant on the said account.
 6. On the 19th May 1959 the Appellant delivered

p 8 a Defence wherein he pleaded, inter alia,
that he opened the aforesaid account as
trustee for the several donors to the Fund
to whom alone he was liable to account; that
p 6 all the cheques set out in Part B of the
List were properly drawn by him; that the
Respondent was not entitled in Law to say
whether cheques drawn under the account were
p 9,133 improperly drawn or not; and that the action
had been instituted without proper authority.
7. The trial before the Honourable Mr.
p 11 Justice Knox-Mawer began on the 11th August
p.11,1.15. 1960. The Respondent's claim for the Rover
motor car was immediately abandoned and no
further question arises in relation thereto.
The learned Judge declined to rule separately
p.12 on the allegation that the action had been
instituted without authority. The Respondent's
Counsel put in certain correspondence by
p.12,1.8. consent and six Returns for the years 1952
to 1957 and called four witnesses, the
effect of whose evidence was as is hereinafter
set out in paragraph 8. In the course of the
cross-examination of the third witness (one
Nath) the Appellant's Counsel withdrew from

the case, which the Appellant conducted there- p 18,1.16.
after in person. The Respondent's Counsel also
conceded that a cheque for £610. appearing in p 18,1,25.
Part B of the List as having been presented on
the 8th August 1956 was properly drawn by the
Appellant; and the Respondent's claim was
accordingly reduced by that amount; and it was
further reduced (on the third day of the trial)
by the sum of £333.13s.9d., being a cheque
(Number 770) for that amount appearing in Part B
of the List so that the net amount ultimately
claimed by the Respondent became £2,609.1s.8d. p 24,1.37

8. The effect of the evidence of the four
witnesses called as aforesaid on behalf of the
Respondent was as follows :

A. George Bentley of the Bank of New South p.12.
Wales produced the cheques in Part B of the List,
the authority of the Appellant to operate the
Building Fund Account and the cheques in Part A
of the list.

B. John Percy Bayly, who was elected President p.13
of the Fiji Kisan Sangh in March or April 1959,
gave evidence of a resolution to institute the
action against the Appellant.

C. Shiu Nath, who was assistant secretary of p.14

the Fiji Kisan Sangh, proved the opening of the Building Fund Account, identified the Appellant's signature on all the cheques in Part B of the List and proved the absence of authority to the Appellant to draw those cheques. In the course of the cross-examination of this witness it was conceded by the Appellant's Counsel that the Appellant had refused to deliver accounts to the Respondent Association; and Counsel for the Respondent Association reduced the Respondent's claim by the two sums of £610. and £333.13s.9d. as above mentioned.

p.25

D. Ghasi Ram Bhola, who had been elected Treasurer of the Fiji Kisan Sangh on the 15th March 1959, corroborated the absence of any authority to the Appellant to draw the cheques in Part B of the List and the passing of the resolution authorising the action against the Appellant.

9. At the conclusion of the foregoing evidence for the Respondent the Appellant submitted that he had no case to answer.

p.28,1.2.

On the 15th August 1960 the learned Judge declined to rule on this submission until

the Appellant had elected whether to call evidence; p 28,1;18.
but before calling upon the Appellant so to do the
learned Judge expressed the opinion that "the
action could not be satisfactorily concluded unless
and until certain accounts and enquiries relevant
thereto had been made". He therefore ordered and p.28,1.21
directed that in default of agreement between the
parties the Registrar of the Court should appoint
a fit and proper person to enquire into all
financial transactions relating to the Fiji Kisan p.30,1.7.
Sangh Building Fund, and to file a complete report
thereon in writing within three months; and he
gave consequential directions to the parties.

10. On the 10th September 1960 the Appellant gave
notice of appeal against the aforesaid order of the p.30,
15th August 1960; and as appears from such notice
be sought an order dismissing the action with
costs or alternatively an order for a new trial.

11. The Fiji Court of Appeal (Hammett, President,
Marsack and Trainor, Judges of Appeal) gave judgment
in this first appeal on the 3rd May 1961. As appears p.34
from such judgment the Court of Appeal regarded this
appeal as misconceived but gave certain directions p.35,1.12
by consent whereby the order of the trial Judge
directing enquiries into accounts was set aside and

the action was remitted to the trial Judge in order that he might proceed with the hearing of the action. The Court of Appeal indicated that they did not feel :

p.35,1.26.

p.35.1.32. "that an order for an account should be made unless and until the learned trial Judge has decided, after hearing all the evidence, whether the action was properly instituted; whether the defendant is accountable to the plaintiff Association; and whether he then considers such an order should be made."

p.35.1.34. The Court of Appeal also ordered that the costs of the appeal should be costs in the cause and abide the result of the trial.

12. In pursuance of the directions of the Fiji Court of Appeal the hearing of the action was resumed by Mr. Justice Knox-

p.36 Mawer on the 16th August 1961. The witness

p.37,1.10. Nath was recalled for further cross-examination by the Appellant, who continued to appear in person. At the conclusion of the further evidence of Nath the Appellant

p.39,1.35 elected not to call any evidence and elaborated his submission that there was no case to answer. The Respondent's Counsel

p.41,1.6 replied, and judgment was reserved.

13. On the 1st September 1961 the learned

Judge (Knox-Mawer J.) delivered his reserved judgment. He held that the action had been properly instituted; that the Fund was clearly the Respondent's money; and that the Appellant was accountable to the Respondent in respect of the disputed items in Part B of the List, viz. after deletion of the cheques for £610. and £333.13s.9d. 14. The learned Judge declined to enter judgment for the Respondent for the balance of the amount claimed but decided that, for reasons which he gave, justice required that the Appellant should be allowed "a final change to account for the monies itemised in List B". After ordering that all the costs in the litigation incurred to date must in any event be paid by the Appellant and directing that the Appellant must also pay the fee of the account to be named by the Registrar, the learned Judge concluded his judgment as follows :

p.45

p.47;1.34

p.48,1.10

"I appoint such qualified accountant as the Registrar shall name as a special referee and it is to this person that the defendant must account within 28 days of today's date. The defendant must satisfy the referee that the monies represented by the cheques itemised in List B were properly applied by him on behalf of the plaintiff-Union. The referee will be requested to file herein a written report within 56 days of today's date. The plaintiff may then move for judgment against the defendant for such amount, if any, as the referee's report states has not been satisfactorily accounted for. Liberty to apply."

p.48,1.14

15. In the respectful submission of the Respondent, unless it be deemed proper to enter final judgment for the Respondent on the findings of the learned trial Judge, the order that he made was just and equitable between the parties and should be restored.

p.50

16. The Appellant appealed from the said judgment on eight grounds which will be found set out in the Appendix but can be summarised as

- (a) a contention that the learned Judge was wrong in law in directing an account, and
- (b) a submission that the action should be dismissed with costs.

p.55

p.55,1,26

17. The Respondent cross-appealed on two grounds which will be found set out in the Appendix and of which the effect was that the learned Judge was wrong in law in not entering judgment in favour of the Respondent on the claim (as reduced) and also in making the order for accounts to be taken when no such order was prayed for in the Statement of Claim.

18. The said appeal and cross-appeal were duly heard by the Fiji Court of Appeal (Hammett, Acting President, Marsack and Trainor, Judges of Appeal) who gave judgment on the 14th June 1962. The Court by a majority (Trainor J.A. dissenting) ordered that the judgment given by the Honourable Mr. Justice Knox-Mawer on the 1st September 1961 be set aside and that a new trial be had between the parties and that no order for costs be made in respect of the appeal.

p.57.63.64

p.57

p.67

19. In his judgment dated the 14th June 1962 the learned Acting President expressed the opinion that

p.64

"the special referee to be appointed has been given insufficient directions as to the basis upon which the account ordered should be taken, and I do not consider it should have been left to him to decide whether or not the items of expenditure referred to him have been 'properly' or 'improperly' expended. To this extent I am of the view that the defendant-appellant is justified in complaining that the whole decision in the case was being left to the special referee to determine when taking an account, which Counsel for the Fiji Kisan Sangh has somewhat to my surprise, said he did not want."

p.66,1.1.

The learned Acting President added that:

"If, therefore, the learned trial Judge had directed that the special referee should merely inquire and report to him the purpose for which the items in List B had in fact been expended, I am of the opinion that such an order might well have been a proper order to make in such an action as this."

p.66,1.23.

The learned Acting President concluded
by saying that :

p.67,1.1. "After giving the whole of the proceedings
in this case careful consideration, and
bearing in mind the fact that both sides
have sought to have the order of the
Court below set aside, I would accede
to these requests.

p.67,1.7. In all the circumstances I am of the
opinion that the ends of justice will
best be met by setting aside the decision
of the Court below and ordering trial de
novo before another Judge."

The learned Acting President then gave
his reasons why he would make no order for the
costs of the appeal but would order that the
p.67,1.10. costs in the Court below should follow the
event of the new trial.

20. Marsack J.A. in his judgment, delivered
p.63 on the 14th June 1962, expressed agreement
with the other members of the Court that the
questions to be determined were

p.63,1.15 "(a) what was the extent of the Appellant's
authority to expend the monies
entrusted to him; and

p.63,1:19. (b) to what extent were these monies
expended within the scope of the
Appellant's authority".

The learned Judge of Appeal agreed that
p.63,1.70 these questions should be judicially determined
and not left to the decision of a referee. He
differed however from Trainor J.A. about the

best method of obtaining a judicial decision and achieving finality between the parties, and concurred with the judgment of the learned President that the only satisfactory solution was that proposed by him.

21. Trainor J.A. in his judgment, dated the 28th May 1962, dealt with the effect of the judgment of the learned trial Judge saying :

"He held that the proceedings were properly instituted; that the Kisan Sangh Building Fund belonged to the Fiji Kisan and that the appellant was accountable to it. He also held that the appellant must satisfy a referee that the cheques for the items in List B were properly applied by him on behalf of the respondents."

Trainor J.A. added:

"The Judge then made an order which afforded the appellant an opportunity of explaining the items remaining in List B after removing therefrom those which the respondents admitted represented payments for their benefit. By doing this the Court already indicated that it considered a prima facie case had been established that the cheques in List B had been improperly drawn (I interpret the word 'improperly' as meaning 'not for the benefit of the respondents')."

Although he has not said so it is quite clear that the learned trial Judge came to this conclusion by reason of the fact that all the cheques in List B were irregularly drawn in that all the requirements, such as the passing of the necessary resolutions, had not been complied with. It is true that cheques in List A had been irregularly drawn too but it was known by the respondents what had happened to the proceeds and no claim was made. It is no argument that if no claim is made in respect of one irregularly drawn cheque that no claim can exist with regard to other

similar cheques.

I think it can be safely said that the evidence adduced by the respondents in establishing their claim was scanty and badly presented but a close analysis of it and particularly the admitted or non disputed documents and the fact that no contrary evidence was adduced left the Judge with no other possible logical conclusion than that the Building Fund belonged to the respondents. Furthermore the oral evidence, unsatisfactory though much of it was, coupled with the admitted or non disputed documents clearly established that the payments shown in List B had been irregularly made. In these circumstances the learned trial Judge was in my opinion entitled, in the absence of anything to the contrary from the appellant, to find that the appellant was accountable to the respondents. The only question remaining was how much."

Subsequently however Trainor J.A., after indicating that in certain circumstances he "might have been more kindly disposed to the application of the Respondent's Counsel to the trial Judge that judgment be given for the amount claimed less the sums admitted to have been paid to the Respondent's benefit", said that :

p 61,1.46

"With great respect to the able and very patient trial Judge I am of the opinion that in the circumstances of this case he erred in appointing a special referee, to whom the defendant must account, with powers to decide which sums are and which sums are not (if any) due by the appellant. It is my opinion that these are matters on which it was desirable for the trial Judge to adjudicate".

Finally (apart from dealing with costs)

p.62,1.5. Trainor J.A. expressed the opinion :

"that the judgment of the Court below should be upheld save that portion which appointed a Special Referee and ordered the appellant to pay all costs. I would remit the case once more to the Court below with directions.

- (a) to dismiss that portion of the respondent's claim pertaining to the motor car, with costs
- (b) to hear such evidence as the defendant may adduce in respect of the remaining items in List B with permission to the respondents to cross examine or call rebutting evidence
- (c) to order judgment for the party in whose favour there is a balance or in favour of the appellant if there is no balance
- (d) to make such order as to costs (other than the costs of the dismissal of the respondent's claim in respect of the motor car) as he considers proper".

22. In the respectful submission of the Respondent

- (a) the appeal from the judgment of the Fiji Court of Appeal should be allowed in so far as that judgment directed a new trial; p.67
- (b) judgment should be entered for the Respondent for the balance of the amount claimed, namely £2,609.1s.8d. with costs or alternatively the order of the learned trial Judge should be restored or in the further alternative the judgment of Trainor J.A. should be upheld and an order made as proposed by him for the following amongst other p.57

REASONS

- (1) Because there is no longer any dispute that

the proceedings were properly instituted or that the Kisan Sangh Building Fund belonged to the Respondent or that the Appellant was accountable to the Respondent; and a new trial would permit and might involve a rehearing of these matters.

- (2) Because the "only question" is (and was before the learned trial Judge) "how much".
- (3) Because the Appellant failed to adduce evidence and therefore ought not to be allowed to contradict the undisputed items in Part B of the List of cheques, whereof the total was £2,609.1s.8d.
- (4) Because all the necessary facts were proved before the learned Judge to enable judgment to be entered forthwith for the Respondent.
- (5) Because a new trial will involve great and unnecessary expense.
- (6) Because as the only question is "how much" an inquiry and report by a special referee followed by a judgment for such amount as may not have been satisfactorily accounted for by the Appellant is the most

equitable alternative to entry of judgment
for the Respondent forthwith.

- (7) For the reasons given by the learned trial
Judge.
- (8) Because the alternative order and directions
proposed by Trainor J.A. are more just than
the order for a new trial.
- (9) For the reasons given by Trainor J.A.

DOUGLAS LOWE.

IN THE PRIVY COUNCIL

No. 35 of 1962

ON APPEAL FROM THE FIJI COURT OF
APPEAL

NATHANIEL STUART CHALMERS (Defendant)
Appellant

- and -

THE FIJI KISAN SANGH (Plaintiff)
Respondent

CASE FOR THE RESPONDENT

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