P.C.
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Judgment
22.1965

IN THE PRIVY COUNCIL

No. 37 of 1963

ON APPEAL

FROM THE COURT OF APPEAL
OF THE STATE OF SINGAPORE

BETWEEN :-

ATURELIYA WALENDAGODAGE
HENRY SENANAYAKE
APPELLANT
(Defendant)

- and -

ANNIE YEO SIEW CHENG
RESPONDENT
(Plaintiff)

CASE FOR THE APPELLANT

Record

1. This is an appeal from a judgment of the Court of Appeal of the High Court of the State of Singapore (Rose C.J., Buttrose J. and Chua J.) dated the 28th day of June 1962, allowing the appeal of the respondent from the judgment of the trial judge (Ambrose J.), dated the 3rd day of November 1961, whereby he dismissed the respondent's claim against the appellant for the return of $20,000 on the sale of five of the appellant's shares in the stockbroking firm of Sena & Goh. Leave to appeal to Her Majesty in Council was granted to the appellant by the High Court of the State of Singapore on the 16th November 1962 and final leave to appeal on the 23rd day of August 1963. p.190 - 1 p. 192

2. The question in this appeal is whether, as the Court of Appeal held, the respondent was entitled to the return of $20,000, or whether, as the trial judge held, the appellant is entitled to resist the claim for $20,000.

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3. The respondent's claim is contained in a statement of claim on a specially endorsed
pp. 1 - 3 Writ, dated 21st day of July 1959 as amended pursuant to an order of the Court dated the
pp. 8 - 10 17th day of April 1961 and as further amended by leave of the Court, dated the 17th day of
p.53 l.25 to p.54 l.25 July 1961, with the effect that the original statement of claim was restored. The respondent's claim can be summarised thus:-

(a) On the 20th April 1959 the respondent, in return for five shares of the appellant's holdings in the firm of Sena & Goh share and stockbrokers, paid $20,000.

p.10 ll.7-15 (b) The payment of the said $20,000 was made on the appellant's representation to the respondent at a meeting on the 13th April 1959 at the house of a mutual acquaintance, that the said firm of Sena & Goh was a "gold mine".

(c) The payment of the said $20,000 was paid subject to two conditions, viz:

(i) that the Malayan Sharebrokers Association would approve of the respondent becoming a partner of the said firm of Sena & Goh; and

(ii) that the respondent would be shown the certified accounts of the said firm of Sena & Goh for the year 1958.

(d) The said representation was at all material times untrue.

(e) The certified accounts of the said firm for 1958 had not, as promised, been shown to the respondent, nor had the Malayan Sharebrokers Association approved of the respondent becoming a partner in the said firm.

4. The respondent's claim was based on a total failure of consideration and a return of the said $20,000 on a claim for money had and received, leave to amend the Statement of Claim to add a further alternative claim

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for rescission of the agreement for the sale of the said shares being refused by the learned trial judge on the 19th April 1961. pp.187-8

5. The appellant's defence, as amended and re-delivered on 2nd August 1961, can be summarised as follows: pp.11-13

(a) The appellant admitted that Sena & Goh were paid the said $20,000 by the respondent as alleged, but denied that she was entitled to that sum or any sum at all. p.11, l.17

(b) The appellant admitted that the agreement for the shares was made on or about 13th April 1959, but that the offer by the respondent to purchase the said shares was made voluntarily and freely and without any canvassing from the appellant or from any of the other existing partners of the said firm. p.11, ll.26-36

(c) The appellant was willing to sell the said shares in accordance with the request of the respondent to become a partner in the said firm, but, in accepting such request, the appellant told the respondent of the firm's recent financial position, and to that end made available to the respondent the said firm's books of accounts for the year 1958. p.11, l.27 to p.12, l.1

(d) A day or two prior to the payment of the said $20,000 on 20th April 1959 the respondent confirmed to the appellant that she had herself inspected the firm's books of accounts for the year 1958 which she later acknowledged in writing on 20th April 1959 in the following terms: p.12, ll.3-14

"To whom it may concern

Upon my approach to Messrs. Sena & Goh for a share in the concern, I was shown the books of account of the company and the Balance Sheet as at 31st December 1958. I have satisfied myself with the position of the company and have willingly agreed to

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p.202

accept the five shares assigned to me by the firm as a going concern".

(e) As a result of such acknowledgment the respondent paid the said sum of $20,000 into the said firm's banking account, and in return both received the transfer of shares and became a partner in the said firm as the result of an agreement between the parties.

(f) It was agreed between the parties on or about 20th April 1959 that the requirement of informing the Malayan Sharebrokers Association and the signing of a formal partnership agreement should be postponed until the return of one, Tan Eng Liak, a partner of the said firm.

(g) In pursuance of the said agreement, the respondent had, since 20th April 1959, attended all the partners' meetings of the said firm and taken part in all the decisions and policies of the said firm's business.

(h) The appellant denied making any representation whatever to the effect that the said firm was a "gold mine" and denied that any conditions as alleged by the respondent were attached to the said agreement for the sale of the shares.

(i) The appellant moreover denied that it was ever a condition of such case that the respondent should see the books of account of the firm for the year 1958 and that the respondent was allowed inspection of such books of accounts as acknowledged by her in the document of 20th April 1959 referred to in paragraph 5(d) hereof.

(j) The appellant denied that the respondent was ever refused access to the certified accounts of the firm for 1958 and affirmed that at no time had the Malayan Sharebrokers Association disapproved of the respondent being a partner in the said firm, the said

respondent's name having been submitted for approval subsequent to 20th April 1959.

6. The learned trial judge made the following findings of fact, all of which were accepted by the Court of Appeal:- p.181, ll.22-25

(a) The appellant did make the representation on the 13th April 1959 to the respondent that the firm of Sena & Goh was a "gold mine". p.170, l.47 to p.171, l.5

(b) The said representation that the firm was a "gold mine" was meant to convey to the respondent that the firm was a flourishing business, and the respondent understood it so to mean. p.171, ll.21-25

(c) The said representation was a material one, and the respondent was thereby induced to agree to buy five of the appellant's said shares. p.171, ll.25-28

(d) The said firm of Sena & Goh was not in fact a flourishing business at the material times; that it was not a "gold mine" as the respondent had made it out to be. p.172, ll.4-9

(e) The payment of the said $20,000 was made with the specific intention on the part of the respondent that she was to become a partner in the said firm and that the respondent was thereby induced to agree to buy five of the appellant's shares. p.172, ll.10-39

(f) The parties neither expressly nor impliedly stipulated that either the agreement or the payment of the said $20,000 was to be subject to the Malayan Sharebrokers Association approving of the respondent becoming a partner in the said firm. p.173, ll.5-10

(g) The respondent had given no evidence of any express condition that the payment of the said $20,000 should be made subject to the certified accounts of the firm for the year 1958 being shown to her; and there was no commercial or other p.173, l.39 to p.174, l.39

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necessity for implying such a term that the agreement was made subject to any such condition.

7. The learned trial judge made no finding as to the appellant's knowledge of the state of the finances of the said firm or whether, despite certain losses, he honestly believed that the firm was a flourishing business.

8. The respondent's evidence on the representation that the business was a "gold mine", was as follows:

(a) She had been a remiser /a broker in the firm of stockbrokers/ in the said firm of Sena & Goh since 1955.

p.18, l.27 to p.19, l.21

(b) In examination-in-chief she said that the appellant "said the business was a flourishing one and that I must not miss this golden opportunity.... I believed what he told me"; and again, "I believed every word of what Mr. Sena had told me. He was a good boss and I always respected him as a very rich man. I had great faith in him."

p.20, ll.12-17

p.21, ll.20-25

(c) In cross-examination she said as follows:-

p.35, l.28 to p.36, l.19

A. The defendant (appellant) told me about the business being a gold mine first and then he told me that Tan Eng Liak had acquired shares.

Q. Did not the business appear to be flourishing in February or March, 1959?

A. Yes.

Q. Would you yourself have described it as a substantial business?

A. Yes.

Q. Dr. Kiani described it as a gold mine?

A. Not Dr. Kiani but the defendant (appellant). I understood a gold mine to be a prosperous business and plenty

of money to earn. I thought so because of the other words used. The word "gold mine" was used after the other descriptions.

Q. By itself the word is ambiguous?

A. To me a gold mine is something very valuable.

9. The learned trial judge found that neither of the two conditions as alleged by the respondent had been established.

(a) In relation to the condition that the sale was subject to the Malayan Sharebrokers Association, the learned judge said that neither the agreements between the respondent and the appellant nor the payment of $20,000 was subject to any implied condition as to the approval of the Malayan Sharebrokers Association; and — p.173, ll.11-37

(b) As to the alleged condition that the sale was subject to the certified accounts of the firm for the year 1958, being shown to the respondent, the learned trial judge said: "The plaintiff (respondent) herself gave no evidence of any express condition to that effect.... I did not see any necessity for implying a term that the agreement ..... was subject to the certified accounts of the firm for 1958 being shown to the plaintiff (respondent). — p.173, l.39 to p.174, l.11; p.173, ll.42-44; p.174, ll.33-38

10. The learned trial judge, having found that the agreement was subject to no such conditions as alleged by the respondent, dealt with a contention by the respondent that while the agreement was for the purchase by the respondent of the said shares it was not an agreement for the respondent to become a partner in the firm. The learned trial judge said "In my opinion, there was no substance in this contention. The plaintiff (respondent) said that the defendant (appellant) asked her to buy his shares so that she could have a better

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interest in the firm; and that the defendant (appellant) told her that he distrusted Goh and that if she bought his shares he would make her run the firm for him. The plaintiff (respondent) herself testified that she thought that she became a partner of the

p.172, l.10-23 firm from the 20th April 1959..... In my opinion, the plaintiff (respondent) paid the money to become a partner and thereby

p.172, l.37-39 have access to the books". And later, the learned judge repeated: "In my view, as from the 20th April 1959, the plaintiff (respondent) regarded herself and acted as a partner.... she was treated as a partner by the defendant (appellant) and Goh Teik Teong.... Tan Eng Liak who became a partner on the 3rd April, 1959, and was away in Japan when the plaintiff (respondent) began to act also treated the plaintiff (respondent) as a

p.175, ll.21-23, 30-1 and 36-41 partner from the time he came to know that she was acting as a partner."

11. The learned trial judge then turned to the remaining question whether the effect of representation as found by him to have been made and acted upon by the respondent, was to give the respondent any right to recover the said $20,000. He said:

p.175, l.15 to l.31

> "It was further submitted by Counsel for the defendant (appellant) that the claim for money had and received was not maintainable as there was no total failure of consideration. It was said that the contract had been in part performed and the plaintiff (respondent) had derived some benefit from it. I accepted this submission. In my view, as from 20th April, 1959, the plaintiff (respondent) regarded herself and acted as a partner. She was introduced to the staff as a partner by the defendant (appellant). She attended partners' meetings. She acted as managing partner when Goh Teik Teong went on leave. She inspected the partnership books, and thereby clearly exceeded the rights of a mere assignee of a partner's share. She was treated as a partner by the defendant (appellant) and Goh Teik Teong."

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The learned judge gave judgment for the appellant with costs.

12. The Court of Appeal expressly accepted the findings of the learned trial judge set out in paragraph 6 hereof, and in particular accepted that the appellant was a majority partner in the firm; also that "it would seem to be probable that she (the respondent) was a partner". p.181, ll.22-25 p.181, l.42 to p.182,l.1 p.185, ll.1-2

The Court of Appeal accepted that the agreement was "primarily" a transaction between the respondent and the appellant personally, but recognised that part of the consideration moving from the appellant was the obligation to make the respondent a partner, which he did, although the Court of Appeal regarded this consideration as lacking in substance. p.186, ll.9-12 p.187, ll.2-23

After setting out the facts substantially as found by the learned trial judge, the Court of Appeal draw the inference from those facts that there was a fraudulent misrepresentation on the part of the appellant; the learned judges of appeal drew such inferences even though fraud was neither claimed, pleaded, led in evidence at the trial, nor found by the learned trial judge. The Court of Appeal concluded:- p.184, ll.29-34

> "We have therefore the position of an imprudent plaintiff (respondent) and an untruthful defendant (appellant). Fraud of course was not pleaded in this case and learned Counsel for the defendant (appellant) makes a point of that. It is not customary in this sort of case to plead fraud and, as has been pointed out by Lord Halsbury in a case which was cited to us, the fact that while innocent misrepresentation only is pleaded the evidence proved something more does not put the plaintiff in any worse position than he would have been in if he had only been able to establish innocent misrepresentation. p.184, ll.16-34
>
> In the present case there is no doubt that on the learned Judge's

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findings there was in fact fraudulent misrepresentation by the defendant (appellant); and upon that fraudulent misrepresentation the plaintiff (respondent) acted and invested her money."

13. As to the question of the representation alleged, that the business was a "gold mine", the Court of Appeal commented:-

p.183, l.37-42

"..... so far from having to go into the question of whether he /the learned trial judge/ was reasonable to disbelieve it, we are all of opinion that he would have been quite unreasonable to believe it."

The Court of Appeal added its own views on the inference of those facts found by the learned trial judge.

p.183, l.42 p.184, l.11

"On the face of it for a business man to come and say in effect that talking with a business woman, having told her that his business is in a bad state, that it had had losses, and that her money - any money that she puts in - will go direct to the bank in reduction of the firm's overdraft, the effect upon the plaintiff was "Very well; instead of putting into the business the whole investment that I was intending /the original offer being 10 shares at $40,000/, I will put in only half" does not make sense. A responsible man of the world who is prepared to swear to that is in my /the Chief Justice's/ opinion prepared to swear to anything; and therefore one cannot quarrel with the learned Judge in disbelieving him on other matters of fact; and in the event the learned Judge disbelieved him in toto."

The learned trial judge did not disbelieve the appellant in toto. The learned trial judge accepted the appellant's evidence that the agreement for the sale of the said shares was not subject to either of the two conditions alleged by the respondent in her

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Statement of Claim, as set out in paragraph 3(e) hereof.

Further, the Court of Appeal accepted the finding of the learned trial judge that the agreement was not subject to either of the said two conditions. The Court said:-

"There was considerable discussion as to whether or not she was technically a partner. The Judge found that she was; because he said she was treated as a partner, and he relies in particular upon one matter, that she had been told by the defendant (appellant) that she could not see the books until she was a partner; and she did see the books. It was in fact only when she saw the books that she realised that a fraud had been perpetrated upon her and the learned Judge therefore found that as she could not have seen the books unless she was a partner, it would seem probable that she was a partner. We do not quarrel with that finding as although the Sharebrokers Association may have raised difficulties - there was evidence to that effect - there is no evidence on the record as to what, if any, steps they could have taken. She was at the lowest a de facto partner and it was from that position that she saw the books" p.184, l.36 to p.185, l.9

14. In the Court of Appeal, judgment was given by Rose C.J., allowing the respondent's appeal; with this judgment Buttrose J. and Chua J. concurred. The Appellant respectfully offers the following comments on the reasoning of that judgment:-

(a) At the outset of the judgment it is stated:- p.181, ll.7-21

"This is a curious case but, as we have made up our minds, we think it is unnecessary to delay the matter further by reserving judgment. It is one of those cases which require to be regarded with considerable caution.

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Any plaintiff who is a knowledgeable person who comes into Court and says that he did something or bought something on the strength of a representation must, naturally, expect his case to be closely examined, because courts as a rule are somewhat chary of finding that a competent plaintiff, a professional dealer or something of that sort, relied in fact on a representation when he had his own knowledge and experience to guide him.

.181, l.23 The judgment added that the "facts seem to us to justify the judge in coming to the decision that he did with regard to them". There follows a summary of the respondent's evidence, setting out the misrepresentation, its falsity and the fact that the respondent relied upon it.

(b) The judgment holds that the respondent was entitled to recover the said $20,000 for the following reasons:

.184, l.29-34 (i) that the finding of the trial judge amounted to a finding of a fraudulent misrepresentation by the appellant, upon which fraudulent misrepresentation the respondent invested her money in the said firm.

.187, l.24-34 (ii) that there was a total failure of consideration entitling the respondent to a claim for money had and received.

.188 l.26-34 .187, l.36 .188, l.4 (iii) that the respondent was entitled to rescission or relief in the nature of rescission of the agreement.

188, ..25-38 (iv) that, since there was only a short lapse of time between the purchase of the shares and the respondent resiling from the transaction, the transaction was in effect being regarded as a nullity thereby entitling the respondent to the return of the said $20,000.

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As to (i) Fraud, it is submitted, was never part of the respondent's case at any time in the proceedings, so that the appellant never had to meet such a serious allegation. It was never suggested in correspondence before action; nor was it at any stage pleaded. At the trial, despite numerous applications to amend the pleadings to include other causes of action, there was never any question of fraud being a part of the respondent's case before the Court. p.170, ll.47 to p.171, l.20

The learned trial judge found that the misrepresentations had been made, and that they were false; but the Court of Appeal was wrong in assuming that the learned trial judge made any finding of fraud, even if on the state of the pleadings he were entitled so to do. There are no findings by the learned trial judge that the appellant knew that the representations were false, without which a constituent element in a claim for fraud is wholly lacking. The Court of Appeal, moreover, did not, if indeed it had any power to do so, find fraud itself. It purported to rely on the trial judge's findings.

Both the Court of Appeal and the learned trial judge found that the respondent was induced by the appellant's representations to invest her money in return both for the said shares and for becoming a partner. This, it is submitted, ignored the uncontroverted evidence of the respondent herself that she would have herself described the business of Sena & Goh as a flourishing business, as set out in paragraph 8(c) above. p.35, l.28 to p.36, l.19

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The Court of Appeal, it is submitted, was wrong in suggesting that "it is not customary in this sort of case to plead fraud", and that the right to rescission for an innocent misrepresentation could persist beyond the point where rescission was no longer available only by the respondent establishing that the representation had in fact been fraudulent, which fact had never been pleaded and, in any event, was not found by the trial judge.

As to (ii) The Court of Appeal, it is submitted, in arriving at the conclusion that there had been a total failure of consideration did not fully, or at all, take into account the following facts:-

p.26 (aa) The respondent, by the end of May or early June, regarded herself as a managing partner and was signing cheques on behalf of the firm in that capacity, and acknowledging officially her duties as a partner.

p.73 (bb) That the respondent by virtue of her acceptance that she was a partner in the said firm had access to the books of account.

p.55, l.33 to p.56, l.27
p.112-113
p.117, l.30
p.141, l.35
p.142, l.18
p.158, ll.1-10
p.162, ll.29-48
p.163, ll.41-43

(cc) That the respondent attended all but one of the partnership meetings as and from 20th April 1959, including the final meeting at the end of June.

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(dd) That the respondent had paid $20,000 not to the appellant but to the firm of Sena & Goh in return for 5 shares in the said firm and by virtue of such shareholding the respondent was appointed Receiver and Manager in the dissolution of the partnership. p.11, l.17 p.28, l.20

(ee) That the appellant did all that was necessary to secure that the respondent became a partner in the said firm. That, since the Court of Appeal was wrong in holding that there was a total failure of consideration, there was no question of any right to a claim for money had and received. Such a claim was not maintainable in the face of the finding of fact by the trial judge - a correct finding, it is submitted - that, at the very least, there had been part performance of the agreement of sale of 13th April 1959.

(ff) The consideration was the procurement of the respondent as a partner. Once she had become a partner - which involved a new and separate contract between the respondent and all the partners - rescission of the contract between the appellant and the respondent was dependant upon rescission of the new partnership agreement, and no attempt to rescind such agreement has ever, nor could it ever have justifiably, been made.

As to (iii) The Court of Appeal, it is submitted, was for the following reasons, wrong in holding that the respondent was entitled to rescission or relief in the nature of rescission of the agreement:- p.188, ll.26-34 p.187, l.36 to p.188, l.4

(aa) The respondent was given this relief although rescission did not arise from the facts as pleaded

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by the respondent in her Statement of Claim. The learned trial judge - rightly, it is submitted - declined to grant leave to the

p.187 ll.39-40

respondent to amend her Statement of Claim so as to add a further or alternative claim for rescission; the learned trial judge - rightly, it is submitted - was not satisfied that the facts as given in the evidence by the respondent could constitute a right to rescind; and the Court of Appeal similarly did not grant leave to the respondent to amend her Statement of Claim although it purported to grant rescission or relief akin to rescission.

(bb) In any event, assuming that the time for rescinding had not long since passed, the respondent's resiling from the agreement of 13th April 1959 took place only after it had been resolved to dissolve the partnership. The right to rescind, if it existed at all, had, moreover at any rate been lost, because restitutio in integrum had become impossible by the time the action was brought in July 1959.

(cc) The payment of the said $20,000 in respect of the sale of the 5 shares in the firm had been made by the respondent to the partnership, and the transfer of the said shares had as a result been executed in favour of the respondent, thereby, destroying any right to rescind which might otherwise have existed.

(dd) For the reason set out in paragraph 14(ii)(ff) hereof.

As to (iv) The only basis (if any) on which the Court of Appeal would have been

justified in holding that the transaction was "in effect being regarded as a nullity" would be a finding of fraud, and for the reasons submitted above that finding was never open to the Court of Appeal, even assuming there was evidence of such fraudulent conduct.

p.188 ll.35-38

The appellant will submit that this appeal should be allowed for the following (among other)

R E A S O N S

(1) BECAUSE the respondent did not act upon the representation made by the appellant but upon her own knowledge of the firm.

(2) BECAUSE the appellant made such representation innocently.

(3) BECAUSE the appellant did not have alleged against him any fraudulent act.

(4) BECAUSE the appellant did not in fact act fraudulently in making the representation.

(5) BECAUSE the appellant gave consideration for the agreement of 13th April 1959.

(6) BECAUSE the consideration for the agreement of 13th April 1959 moved from the appellant to, and was received by, the respondent.

(7) BECAUSE the appellant was not liable to the respondent on a claim for money had and received.

(8) BECAUSE the agreement between the appellant and the respondent had been wholly or in part performed.

(9) BECAUSE the respondent had no right to rescind the agreement.

(10) BECAUSE the respondent had lost the right (if any) to rescind the agreement.

(11) FOR THE reasons given by Mr. Justice Ambrose.

(12) BECAUSE the judgment of Chief Justice Rose was wrong, for the reasons given in paragraph 14 of this Case.

(13) BECAUSE the Court of Appeal was wrong and its judgment ought to be reversed.

MARK LITTMAN

L.J. BLOM-COOPER

No. 37 of 1963

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ATURELIYA WALENDAGODAGE
HENRY SENANAYAKE — Appellant (Defendant)

- and -

ANNIE YEO SIEW CHENG — Respondent (Plaintiff)

CASE FOR THE APPELLANT

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