167

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

21

Civil Appeal No. 57 of 1982

Between:

ARTHUR JENNINGS trading as ARTHUR JENNINGS CONSTRUCTION — Appellant

- and -

LAL MOHAMMED & SONS LIMITED & LAL MOHAMMED ENTERPRISES LIMITED — Respondents

V. Kalyan for appellant.
J. Reddy for respondents

Date of Hearing: 20th July, 1983
Delivery of Judgment:

JUDGMENT OF THE COURT

O'REGAN, J.A.

This is an appeal from the judgment of Williams J. whereby he dismissed an appeal from the decision of Mr. L.R. Blin, Resident Magistrate at Sigatoka in two civil actions which, by consent, were heard together.

On 2nd May 1980, each of the respondents wrote to the appellant seeking payments of money said to be due and owing for goods sold and delivered. The claim by Lal Mohammed & Sons Limited was for $556.20 and that of Lal Mohammed Enterprises Limited was for $760.29. There was no dispute as to the sale of the goods in question or as to the amounts payable in respect of them.

In response to simple claims for debt, the appellant pleaded that he, with the respondents knowledge ordered the goods in question as agent from one Eddy Van Oirschot, who traded under the name and style of Pacific Pisces, for use on a building project known as the Pacific Pisces Holiday Resort; or alternatively that the plaintiffs' contracts were with A.G. Jennings Construction Limited, which was acting as Construction supervisor for the Pacific Pisces Holiday Resort project. It was the evidence of the defendant that he introduced Van Oirschot to Mohammed Aziz, the Secretary of both respondent companies and to one of the directors of them and that agreement was concluded that all the materials ordered from and delivered to the site of the Pacific Pisces venture at Namada were to be paid for by Van Oirschot. The defendant said also that he had arranged with Aziz that goods ordered for delivery to Korotogo were to be charged to and paid for by A.G. Jennings Construction Limited. Mohammed Aziz denied such arrangements and in the event the learned Magistrate said that he preferred his evidence to that of the defendant.

The learned Judge in the Supreme Court, in those circumstances, held himself bound to accept the learned Magistrate's conclusions. In so doing, said :

"The learned Magistrate who saw and heard the witnesses, stated quite definitely that he preferred the evidence of Mohammed Aziz to that of the defendant, Mr. Jennings. He had an advantage on that respect which is denied to the appellate Court and there is nothing in the record which suggests that the Magistrate was wrong in preferring the evidence of Mohammed Aziz. It would be contrary to established principles for me to differ from him.

Therefore in the evidence of Mohammed Aziz which the Magistrate preferred and his supporting witnesses I am bound to accept the learned Magistrate's conclusions."

It is trite law, of course, that it is only in rare cases that an appeal Court, hearing an appeal both as to fact and law, should differ from the trial Judge first, on findings as to the credibility of witnesses and secondly on other findings which have their genesis solely in credibility.

The Magistrate's preference of the evidence of Mohammed Aziz to that of the appellant must, we agree, conclude the issue as to whether or not goods delivered to Namada were to be charged to Vanoirschot.

But there were other factors in the case which did not turn on credibility. There were a number of documents dealing with the transactions which could not be left out of consideration. And the inferences which were to be drawn from them could, just as well be drawn by the Judge on appeal as in the trial Judge.

We think that the learned Judge in the Supreme Court in couching his reasons for upholding the Magistrate in such wide terms, erred in law. The true position finds clear expression in Mersey Docks & Harbour Board v. Procter (1923) A.C. at p. 258-9, where Lord Cave L.C. is reported as saying :

24

> "The procedure on appeal from a Judge sitting without a jury is not governed by rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the court of appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where credibility of witnesses comes into question, but with full liberty to draw its own inferences from the facts proved or admitted, and to decide accordingly."

The emphasis is ours. That passage was approved by Viscount Simonds in Benmax v. Austin Motors Co. Ltd. (1955) A.C. 370 at p. 375 where, having so done, he went on to say :

> "This does not mean that an appellate Court should lightly differ from the finding of the trial Judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned in the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or as it is has sometimes being said, between the perception and evaluation of facts."

The issue as to whether the goods delivered to Namada (the smaller claim) were to be charged to Van Oirschot having been concluded and correctly concluded against the appellant, the question remained whether all the items in both claims should have been charged to Mr. Jennings personally or to his Company. This, too, the learned Judge dealt with solely on the basis of the Magistrate's preference of the evidence of Aziz.

In resolving both claims the learned Magistrate drew inferences adverse to the appellant from the fact that when he or his servants signed delivery notes they did not indicate that they were signing on behalf of the company. In our view, that conclusion entirely misconceived the purpose of signatures to delivery notes. They are taken to establish the fact of delivery and by whom delivery was taken and do not touch the issue as to the identity of the parties to the contract of sale.

In respect of the Namada job, Aziz said that Jennings told him to supply Namada and charge Jennings Construction. In another part of his evidence he said : "I should have made invoices with the words "Ltd." and added,"the word 'Ltd.' was left out 'in error'."

In our view that evidence, accepted by the Magistrate, concludes the question insofar as it refers to the Namada account for $556.20.

In respect of the Korotogo claim, the documentary evidence speaks clearly. First, the statement of 31st August 1980 for $760.29 is addressed to A.G. Jennings Construction Limited, Korotogo. That statement was compiled from 14 invoices itemised on Exhibit 4. All except two of those invoices namely 062 and 110, were made out to Jennings Construction. Aziz himself said that 062 was an error and should also have been debited to Jennings Construction which, from his evidence already referred to, was acknowledged to mean Jennings Construction Limited. The only remaining invoice (110) is in the name Jennings personally. Perhaps all that need be said is that it was for $4.50 and that on the de minimis principle that has no contrary evidentiary value.

172

26

The learned Judge reached the conclusion :

> "That the case was one where Mohammed Aziz was aware of the existence of the principal but not sure whether he should debit the principal or Mr. Jennings because Mr. Jennings had not instructed him to debit the principal."

and he went on to say :

> "In Bowstead on Agency, 13th Edition p. 375 it is suggested that when the agent acts for the principal whose existence is known but who is not named the agent prima facie is liable on the contract and the inference will be that he is liable in addition to and not in substitution from the principal. It seems that the actions in question reveal such a situation as is referred to in "Bowstead" - - - - - - - -".

The same passage appears also in the 14th edition of Bowstead in which it is followed immediately by this sentence :

> "Though sometimes his liability may cease or disclosure of the principal's identity."

That sentence does not appear in the 13th edition, but in both editions the passage cited by the Judge is followed by these words :

> "Though the fact that the agent does not name his principal is obviously relevant in determining whether he contracts personally, it does not seem possible to be dogmatic on this point on the basis of the English cases."

27

While perhaps of some academic interest, the passage cited by the Judge is of little or no authority and to the extent that he relied upon it, he has erred.

In any event, as we have shown there was disclosure. The evidence of Mohammed Aziz, containing as it does his own identification of Jennings Construction as A.G. Jennings Construction Limited, and accepted, as it was by the Magistrate, established that with one trifling exception, the company was understood to be the debtor.

All in all, we are of the opinion that the appeal must be allowed and it is allowed accordingly with the result that the judgments in the Magistrates Court are set aside and the actions are dismissed. The order for costs in two Courts made in the judgment of Williams J. is set aside and it is ordered that the appellant have his costs in all three Courts, to be taxed if not agreed.

.....
Vice President

.....
Judge of Appeal

.....
Judge of Appeal