ARJUN MUDALIAR & ANOTHER

A

v.

LAL BAHADUR

[COURT OF APPEAL; 1976 (Gould V.P., Marsack J.A., Henry J.A.), 2nd, 16th March]

B

Civil Jurisdiction

Contract—action for money had and received—part of contract price withheld—onus on parties withholding money to establish their authority for so doing. Evidence and proof—action for money had and received—part of contract price withheld—onus on parties withholding money to establish their authority for so doing.

C *Practice and procedure—action for money had and received—two members of a nine man committee sued—whether successful plaintiff entitled to judgment against these named defendants only or against whole committee—Rules of the Supreme Court* 1934 *(applied)* 0.16 r.9—*Rules of the supreme Court* 1968 *(applied)* 0.15 r. 12—*Magistrate's Courts Rules* 0.8 *rs.* 1, 3, 4, 5 (3).

D The committee of a cane harvesting gang unilaterally withheld a sum of money from a grower which was due to him from the sale of his cane. Both the Magistrate's Court and the Supreme Court held that the onus was upon the committee to produce its constitution setting out its powers and to establish its authority for making the deduction. Failure so to do entitled the grower to judgment.

The grower had sued the two appellants in their own names as committee members of Tiri Gang Wailevu. The judge in the Supreme Court held that this was a representative action and that the grower was entitled to judgment against the whole committee.

Held: Although the decision of the lower courts was correct, the judge had erred in his order. The judgment operated against the two named appellants only and not against the other members of the committee. Except for the description of the appellant in the statement of claim, there was nothing in the record to show that the F grower sought reimbursement from the committee through the two named representatives.

Cases referred to:

Lee v. Showmen's Guild of Great Britain [1952] 2 Q.B. 329; [1952] 1 All E.R. 1175.

G *Royle; Fryer v. Royle, In re* (1877) 5 Ch. D. 540.
Tottenham, In re [1896] 1 Ch. 628.
Walker v. Sur [1914] 2 K.B. 930; (1914) 83 L.J.R. 1188.
Hardie & Lane Ltd. v. Chiltern [1928] 1 K.B. 663; (1928) 97 L.J.R. 539.

Appeal from the judgment of the Supreme Court dismissing an appeal from the decision of the Magistrate's Court awarding damages and costs against the appellants.

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K. C. Ramrakha for the appellants
M. Maqbool for the respondent.

The following judgments were read:

MARSACK J.A.: [16th March 1976]—

This is an appeal from the judgment of the Supreme Court sitting at Labasa on the 22nd October 1975 dismissing an appeal from a decision of the Magistrate's Court, Labasa given on the 12th July 1974 awarding the respondent the sum of $69.08 and costs against the appellants. This appeal, under section 12(1) (d) of the Court of Appeal Ordinance, is limited to questions of law only.

The basic facts may be shortly stated. The appellants and the respondent were in 1974 members of a 45-men cane-harvesting gang known as Wailevu Tiri. The affairs of the gang were administered by an elected committee of nine; the appellant Arjun Mudaliar was President, and appellant Mathura Prasad a member of this committee. The powers and duties of the committee were set out in a document, signed by all parties, which was referred to throughout the evidence as "the constitution".

The conduct of the actual harvesting operations was in the hands of a sirdar, Subramani, subject to general directions from the committee. During the harvesting operations a fire broke out on an adjoining farm and this spread to the property of the respondent, with the result that a certain quantity of his cane was burnt. It is provided in the contract between the millers and the growers that burnt cane must be delivered to the mill within seven days of burning, and the price paid for it is subject to certain deductions assessed on the basis of the number of days elapsing between burning and delivery to the mill. On the sixth day after the fire the respondent took over all 12 trucks which had been supplied to the gang for harvesting operations, and used nine of these to have the rest of his burnt cane delivered at the mill. The committee objected to this action by the respondent; but after the matter had been referred to the mill overseer they withdrew their objection to the use of the trucks. This was on the suggestion of the overseer. When moneys payable to the growers were sent to the committee, this body deducted a sum of $69.08 from the share to which the respondent was entitled.

It is somewhat difficult to ascertain from the judgments under appeal exactly what reasons was given by the committee for the deduction of these moneys. The trial magistrate, in his judgment, refers only, on this point, to the evidence of the sirdar Subramani to the effect that the committee penalised the respondent in that sum for "labour costs." The learned judge, in his judgment refers to the deductions as made "allegedly as a penalty for burned cane." The one thing that must be taken as a fact is that the deduction was made by the committee because of the taking of the 12 trucks by the respondent.

The judgment of the trial magistrate, which was upheld by the learned judge on appeal, was based on a finding that the deduction had been made by the committee, and that the onus lay on the committee to establish its authority for making the deduction; and as no satisfactory explanation had been given by the members of the committee who were before the court, the respondent was entitled to judgment.

The grounds of appeal requiring consideration by this court may be shortly summarized as under:

(1) That the learned trial judge erred in law in holding that the onus lay on the appellants to show that the deductions were rightfully made;
(2) That the learned trial judge erred in law in holding, in effect, that the judgment rendered the appellants personally liable.

The first ground of appeal, in my view, presents no real difficulty. It is established beyond doubt that the committee withheld the sum of $69.08 which normally would

have been paid to the respondent, and then distributed this money among other members of the gang. In my view the respondent was quite entitled to ask, under what authority have you deprived me of those moneys?

An obligation then lay upon the persons who had made the deduction to justify their action. This, in the present case, would necessarily have involved the production of the document known as "the constitution" setting out the powers of the committee generally. It is hard to understand why that document was not produced in the evidence. It was, in my opinion, for the appellants to produce it. Its production might well have enabled the learned magistrate to decide the matter without the real difficulty which he found as it was. I am quite unable to accept the contention of counsel for the appellant that the onus lay on the respondent to bring the "constitution" before the court. When moneys have been withheld from a person lawfully entitled to those moneys, then if the action is challenged—as it was here—it is clearly the duty of the person or persons withholding those moneys to show the authority for doing so.

Counsel for the appellants put forward the principle that the courts will not in case such as this, interfere with the decision of a committee which is based on fact; and he cited in that connection the judgment of the Court of Appeal in *Lee v. Showmen's Guild* [1952] 2 Q.B. 329. But that judgment firmly lays it down that the courts will, in such cases, examine the decision of a committee to see that it acted correctly under the rules of the Association, and that it dealt with the matter in a way not contrary to the principles of natural justice. In the present case it has been put out of the court's power to examine the question of whether or not the committee acted correctly under the rules. Not only was the so-called "constitution" not produced, but no evidence was given on behalf of the appellants as to the rule or rules under which the committee had acted. In these circumstances it is impossible to hold that the court must necessarily accept the decision of the committee.

Accordingly, I would hold that the decision of the court below on this issue was correct, and that appellants cannot succeed on the first ground.

The second ground presents more difficulty. According to the statement of claim, the appellants were sued "As Committee members of Tiri gang, Wailevu, Labasa." In counsel's contention the judgment of the Magistrate's Court does not make it clear whether it is against the appellants personally or against the gang through its two stated representatives.

The judgment reads:

> "The Plaintiff therefore succeeds in his claim and judgment is accordingly entered for the Plaintiff in the sum of $69.08 with costs. Costs to be taxed if not agreed."

Counsel further submits that it is not clear whether the appellants are to satisfy the judgment out of their own moneys or out of gang funds. Counsel refers to the Magistrate's Courts Rules, Order VIII, Rule 1 which provides:

> "If any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. The Court may order any of the persons represented to be made parties either in lieu of or in addition to, the previously existing parties."

Here, in counsel's submission, the appellants were sued in a representative capacity; no application was made by either plaintiff or the defendants to join the

rest of the committee as parties and no action was taken by the court in that direction. In these circumstances counsel urges there should be either a nonsuit or order for retrial. A

However, it would appear that the situations is covered by rule 4 of Order VIII which reads as follows:

> "Where a person has a joint and several demand against two or more persons, either as principles or sureties, it is not necessary for him to bring before the Court as parties to a suit concerning that demand all the persons liable thereto, and he may proceed against any or more of the persons severally or jointly and severally liable. Where a defendant claims contribution, indemnity or other remedy or relief over against and other persons, he may apply to have such person made a party to the suit." B

In my opinion, any liability shown to exist on members of the committee in respect of the matters in issue must necessarily be joint and several. That being so it was open to the plaintiff to sue all or any members of the committee without joining the others or making any application for them to be joined. C

Great emphasis was placed by counsel in his argument on the description of the defendants—the appellants—in the statement of claim. In counsel's submission, the plaintiff's action in describing the defendants as "Arjun Mudaliar and Mathura Prasad as committee members of Tiri gang, Wailevu" clearly indicates that the claim was brought in reality against all members of the committee, the nominal defendants being sued strictly in a representative capacity. The trial magistrate was not prepared to make a definite finding on this point. The learned judge however, states in the course of his judgment: D

> "It was clearly a representative action.....The defendant sued in a representative capacity and that capacity is expressed on the writ." E

This however was not given as one of the reasons for dismissing the appeal and may perhaps be regarded as obiter. Be that as it may, I am unable, with respect, to accept that view. Nothing in the conduct of the case gives any indication that the claim was really against the committee as a whole. I can find nothing in the record to show that the respondent sought reimbursement from the committee through the two name representatives. The only ground upon which such a finding could be made would thus appear to be the description of the defendants in the statement of claim in the words "As Committee members of Tiri gang." Those words may well have been added to indicate that the claim concerned the actions of the gang. They might even have been regarded as descriptive; but certainly not, in my opinion, as an unequivocal statement that the claim was really against the committee as a whole and not against any members of the committee individually. F

The learned judge held that the action was really one for money had and received. In this event the judgment of the Court of Appeal in *Hardie and Lane Ltd. v. Chiltern* [1928] 1 K.B. 663 is strictly relevant. In that case three members of an Association of Motor Dealers were sued "on their own behalf and on behalf of all other members of the Association." It was held that the plaintiffs were not entitled to maintain the action against the defendants as representative of the other members of the Association. In the course of his judgment Lawrence L.J. states at page 701: G H

A "The principles laid down.....conclusively establish that in an action like the present the Court ought not to pronounce a judgment which would bind the absent members of the Association and make them liable for damages or conspiracy or for money had and received to the use of the plaintiffs."

In the result I find the position to be this. The respondent sued the appellants for the return of $69.08 withheld by the gang committee—of which the appellants were members—from moneys payable to the respondent. Judgment was given, in the B words set out above, for this amount in favour of the respondent against the appellants. By virtue of that judgment the appellants are personally liable to satisfy the judgment in favour of the respondent; the appellants being, as I have tried to explain, severally as well as jointly liable in the matter. Although I feel that the court can be indebted to Mr Ramrakha for his painstaking argument, yet no grounds have been shown for interferring with the judgment of the court below. Accordingly, I C would dismiss the appeal and order the appellants to pay the costs, to be taxed if not agreed upon between the parties.

GOULD V.P.

The facts in this case are set out in the judgment of Marsack J.A. and there is no need to repeat them.

I agree fully with what is contained in that judgment on the subject of the onus of D proof. When the respondent had produced sufficient evidence to show that the committee had withheld moneys to which the respondent was entitled, the onus of showing justification for the deduction fell on the appellants. I would add a word on the question of Mr Ramrakha's argument, which he sought to link with the question of onus, that the courts would not interfere with a decision (based on facts) of a domestic committee such as the present one, for which his authority was *Lee v. Showmen's* E *Guild of Great Britain* [1952] 2 Q.B. 329. In the Supreme Court the learned judge refused to entertain this submission as it had not been raised in the Magistrate's Court. I think the learned judge was correct, as full consideration of that matter would require much more evidence than was actually given. In any event, I think Mr Ramrakha finally conceded that the argument was of no avail in a case involving rights of property and a committee connected with the operation of a trade, and that had its rules been produced and the committee been shown to be wrong, the court F had jurisdiction to intervene. That concession really disposed of the matter.

The second main question is whether this action was a "representative" one in the sense that the judgment was binding upon all members of the committee. In the Supreme Court the learned judge held that it was, saying—"The defendants are sued in a representative capacity and that capacity is expressed in the writ." He then goes on to refer to Order 15 rule 12 of the Rules of the Supreme Court.

G

As to whether the addition of the words "as committee members of Tiri Gang Wailevu, Labasa" in the summons after the names of the two defendants, and the further reference to them "as committee members" in the particulars of claim, is a sufficient "expression on the writ" of the nature of the action, I have no doubt that, at least technically, it is not. The words are ambiguous and what they particularly lack is the assertion that the defendants are sued only *as* members of the *committee* in H question but *on behalf of* themselves and all the other members of the committee. See *Chitty; King's Bench Forms* (17th Edn.) p. 63 (Representative Party); *In re Royle: Fryer v. Royle* (1877) 5 Ch. D. 540; *In re Tottenham* [1896] 1 Ch. 628 *Walker v. Sur* [1914] 2 K.B. 930. I am of the view that the words used were insufficient, though they could have

been expected to draw the attention of the counsel on both sides and of the magistrte to the fact that a question arose which should be settled at the outset.

It is necessary to set out the relevant rules, which appear in Order 8 of the Magistrate's Courts Rules. They are rules 1, 3, 4 and 5(3):—

"1. If any plaintiff sues, or any defendant is sued, in any representative capacity, it shall be expressed on the writ. The court may order any of the persons represented to be made parties either in lieu of, or in addition to, the previously existing parties.

3. Where more persons than one have the same interest in one suit, one or more of such persons may be authorised to sue or to defend in such suit for the benefit of or on behalf of all parties so interested.

4. Where a person has a joint and several demand against two or more persons, either as principles or sureties, it is not necessary for him to bring before the court as parties to a suit concerning that demand all the persons liable thereto, and he may proceed against any one or more of the persons severally or jointly and severally liable. Where a defendant claims contribution, indemnity or other remedy or relief over against any other person, he may apply to have such person made a party to the suit.

5. (3) No suit shall be defeated by reason of non-joinder or misjoinder of parties."

It will be seen that Order 8 rule 1 covers all actions in representative capacities so far as the form of the writ is concerned. Some persons clearly have a representative capacity by law, e.g. executors; they must follow rule 1 but need no further authorisation. To sue them "as executors of—deceased" fully complies with rule 1.

Rule 3 however, deals with the special case of persons having the same interest in one suit. There is no implication by law that e.g. a committeeman represents all the other committeemen, and it follows that if some members are sued on behalf of the whole committee it should be clearly so stated. There is, however, a further important consideration with which I will now deal.

Rule 3 is the rule which governed this case: it is in almost the same terms as Order 16 rule 9 of the Rules of the Supreme Court, which was in force in Fiji before the present Supreme Court Rules came into effect on the 3rd March 1969. I will copy Order 16 rule 9 from the 1953 Annual Practice:

"9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested."

It will be noticed that the Fiji Magistrate's Courts rule is even more restricting for whereas under Order 16 rule 9 only the right to defend for other persons appears to need the court's authority, under the Fiji rule a plaintiff must be authorised to sue and a defendant to defend, on behalf of others, in cases falling within the rule.

It is necessary to add that Order 16 rule 9 in 1962 became, in a much widened form, Order 15 rule 12 which in due course, by the Fiji Supreme Court Rules 1968, became part of the rules of the Fiji Supreme Court.

The construction I would put upon Order 8 rule 3 of the Magistrate's Courts Rules is that before a defendant can defend on behalf of others he must be authorised, and that means authorised by the court. In making such an order the

court would consider whether the named defendants consented, whether the named
A defendants were in fact persons who might properly represent the others and, of course, whether the action was one which was within rule 3 in the sense that the defendants all had "the same interest."

If this authority is not obtained in my opinion any judgment obtained will bind only the named defendants. If the plaintiff desires to secure a judgment binding upon persons not so named, it is upon him to apply for the necessary authority
B though no doubt the defendants in certain cases might do so for their own purposes.

In Walker v. Sur [1914] 2 K.B. 930, the Court of Appeal had to construe Order 16 rule 9, which is set out above. The plaintiff in that case named four defendants "on their own behalf and on behalf of all other members of" an unincorporated religious society. This was not regarded in itself as sufficient, for the plaintiff after
C commencing his action, applied to the court under Order 16 rule 9 for an order that the writ and all subsequent proceedings be amended by describing the defendants as being "sued on their own behalf and on behalf of all other members of" the society, and further that "....they be directed to defend the action on behalf of or for the benefit of all persons so interested." The named defendants were not trustees and the claim was a claim for money; the Court of Appeal held that the plaintiff was not entitled to an order.

D

Vaughan Williams L.J. in his judgment said that he did not feel that he had thoroughly understood what the rule-makers meant by Order 16 rule 9. But he went on to say, at page 934—

> "The rule, as it stands, does not purport to leave it to the mere will or choice of the plaintiff or of the defendants not to give a right in either case of selection at the choice of a plaintiff who wishes to sue representative members of an unincor-
E porated society. As I understand the rule, it lies with the judge to give the authority, and if he thinks it a case in which the plaintiff may properly sue the persons that he proposes to sue as people proper to be authorised to defend in such cause or matter on behalf of or for the benefit of all persons so interested, then the order may be made. That has not happened in the present case."

In the judgment of Buckley L.J. is a short passage which has a bearing, relevant
F to the circumstances of the present case, upon the merits of the matter rather than the procedure. It is at page 936—

> "We have to determine whether this action ought to go on so as that execution could be maintained against all the persons represented. In my judgment that would be impossible. It is simply an action of debt against a large number of individuals and no judgment could be obtained which would be representative
G against all of them; there could only be a judgment individually against each of them.

Kennedy L.J. said, at pp. 936—937—

> ".....it is not pretended that, as was the case in the Daff Vale Case, there are any funds vested in trustees. It is not alleged that there are any such trustee at all, and the claim is to my mind a claim in which it is sought to take a judgment for pay-
H ment of money effective against a number of persons who belong to a named society but who have no common fund vested in trustees who could be joined as representing the society.

When I consider the nature of a money claim, I think the case becomes for this purpose reasonably clear, because day by day, if this is a large body, one member is going out and another is coming in. The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract and in the case of an outgoing member you would have to take the state of things at the date of the judgment." A

The passages I have quoted were relied upon by Fraser J. in *Hardie and Lane Ltd. v. Chiltern* [1928] 1 K.B. 663, which has been referred to by Marsack J.A. in his judgment. Fraser J.'s judgment was upheld by the Court of Appeal (see the same report) and *Walker v. Sur* among other cases was followed. B

From a procedural point of view *Hardie and Lane Ltd. v. Chiltern* differed from *Walker v. Sur* in that in the former case it was the defendants who successfully applied to have the allegation of their representative function eliminated from the plaintiff's pleadings. This does not affect my opinion that Order 8 rule 3 necessitates a court order before one defendant may defend for the benefit of or on behalf of others. I rely on the following passage from the judgment of Sargant L.J. in *Hardie and Lane Ltd. v. Chiltern,* at p. 699— C

"In my judgment, the two cases just cited, which of course are binding here, show clearly that an application by the plaintiffs to join the defendants or any of them in the proposed representative capacity would be unseccessful; and this being so, the attempt to join them without leave must also fail." D

The "attempt" referred to in the concluding words of that passage was the allegation of representative capacity without application for the authority of the court.

In my judgment, therefore an application for a representative order, had one been made, may well have failed because the committee consisted only of nine members who could probably have been joined personally without difficulty and would in any event have failed on the authority of the two cases I have mentioned. In the event, however, no application was made, which in my opinion negatived any possibility of the action being treated as representative. This is of course additional to the matter of the inadequacy of the summons to convey that intention. E

For these reasons I think that while the learned judge in the Supreme Court correctly said that it was open to either of the parties to move the court for a representation order, with respect, he was wrong in thinking that because the defendants (appellants) made no such application the effect was the same as if an order had been made. The learned judge also, I think misapplied Order 8 rule 5(3), which I have quoted above. The suit was not defeated, but took effect in relation to the parties properly joined. I agree with Marsack J.A. that it was governed by order 8 rule 4 (supra) and the judgment operated, and still operates, (as indeed it was worded by the learned magistrate) as a judgment against the named defendants personally and not against the other members of the committee. F G

I would emphasize that nothing I have said applies to the construction of the present Supreme Court rule Order 15 rule 12, which I think undoubtedly influenced the learned judge, and which is wider than Order 8 rule 3 of the Magistrate's Courts Rules. Order 3 rule 8 of those rules justifies the importation of the Supreme Court Rules in cases where there is "no provision" in the magisterial rules to meet the circumstances arising. That provides no justification for regarding Order 8 rule 3 of the Magistrate's Courts Rules as having been amended in any way by the Supreme Court Rules and it must be given effect according to its tenor. H

All members of the court being in agreement as to the order to be made, the
A appeal is dismissed with costs.

HENRY, J.A.

I agree, for the reasons set out in the judgment of Gould V.P. and Marsack J.A. that this appeal should be dismissed with costs.

Appeal dismissed.

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