Tangitau v Paunga

Privy Coucil
App 7/1978

30 April 1980

Appeal - principles to be applied by appellate court in relation to decisions of facts made by trial court

Appeal - principles to be applied by appellate court in relation to awards of damages made by trial court

Contracts - Contract Act does not prevent proceedings for conversion of assets of partnership created by oral agreement

Contracts - promise to release person from liability must be supported by consideration unless it operates as a promissory estoppel

Paunga brought proceedings in the Supreme Court against Tangitau for his share in the sale of vanilla plants which he claimed had been grown in partnership between the two, which Tangitau denied. The Supreme Court upheld Paunga's claim and assessed damages at $700.
Tangitau appealed to the Privy Council.

HELD:
Affirming the decision of the Supreme Court.

(1) The Supreme Court's finding that there was a partnership between the plaintiff and defendant with regard to the vanilla plants was a finding of fact which could only be overturned on appeal if the appellant could show that the trial judge had failed to take proper advantage of seeing and hearing the witnesses when assessing their credibility, or that the evidence accepted by the trial judge as credible was demonstrably insufficient to support the judge's conclusion, and in neither of these respects had the appellant shown that the decision of the trial judge was wrong;

(2) Section 5 of the Contract Act did not apply to the present proceedings which were based upon the conversion of assets belonging to a partnership;

(3) A letter written by the respondent did not release the appellant from liability because there was no consideration given for it, and because it did not constitute a promissory estoppel;

(4) The fact that a letter denying the claim of the respondent had not been answered by the respondent did not prove that the contents of the letter were accepted as true by the respondent, but was just one piece of evidence to be considered together with all other relevant evidence by the trial judge;

(5) An award of damages will only be set aside by an appellate court if it is shown that the trial court was in error in that it applied a wrong principle of law, or misunderstood the facts, or, for some other reason, made a wholly erroneous estimate of the damage suffered, and since this had not been shown by the appellant, the award of damages must stand;

(6) Any claim by the appellant for certain expenses should have been made by counterclaim, or could be the subject of a separate claim, but could not be deducted from the damages awarded in these proceedings.

Statutes considered
Contract Act s5

Cases considered
Davies v Powell Duffryn Associated Collieries Ltd [1942] 1 All ER 657
Watt (or Thomas) v Thomas [1947] 1 All ER 582
Baker v Barclay's Bank [1955] 2 All ER 571

Privy Council

Judgment

This is an appeal from a judgment of the Supreme Court awarding respondent the sum of $700 for his share of the value of certain vanilla plants which the Court held were grown in a partnership between appellant and respondent. The Court held that the share of respondent in 1483 vanilla plants taken from the plantation had been wrongly converted by appellant. The grounds of appeal may be summarised as follows:-

(1) that the learned Judge was wrong in holding that a partnership existed between the parties;

(2) that if a partnership did exist it was void by reason of the provisions of Section 5 of the Contract Act (Cap.113);

(3) further, that appellant was released from liability by reason of a letter written by respondent and addressed to appellant such letter being produced as Exhibit 4;

(4) that a letter dated August 30, 1977 (Ex.3) which was sent by appellant's counsel to Fotofili Paunga alleging that respondent has no interest in the plantation, not having been answered by a denial from respondent, was evidence that respondent accepted as a fact that he had no interest in the plantation, and;

(5) that the damages were excessive.

Before dealing with the question whether or not respondent proved there was a partnership it is convenient to deal with grounds 2, 3 and 4 because, if any one of these grounds succeeds, then the appeal must be allowed and the judgment for $700 set aside. These grounds are dealt with on the assumption that there is a partnership leaving this question to be determined later if these defences fail.

Section 5 of the Contracts Act provides that no action shall be maintainable upon any Contract for goods to be supplied money to be lent or services to be rendered where the consideration exceeds £25 unless the party suing produces to the Court a written agreement executed and registered in accordance with the Act. The present action is based on an alleged conversion of assets belonging to a partnership between the parties. Such an action does not come within the words of Section 5 so ground 2 must fail.

Ground 3 is a claim that the Contract of partnership was terminated by reason of the letter produced as Exhibit No.4. The letter reads as follows:-

"1/9/77

Leasina Tangitau,

With great respect I hereby apologise you and your husband for not informing you regarding the money I borrowed last week. Leasina, I'm writing you because of what happen

'Akanete and I have agreed to all I told you and your husband after I was released from prison, that you please yourself over everything for you knew all about my joint plantation with your husband. Your brother shares the same view as I do. Though I am poor but you, your husband and children can have everything on the allotment including our plantation there without any further demands from us as long as you'll be satisfied as it's not as was anticipated.

Leasina the coconut (copra) I said I'll sell as in order to repay you your money, part of it will be sold today due to weather conditions and that I was busy getting Fuka's missionary donations. Don't think I will not pay you due to what happened for I will but I'm only asking of you to give me time as I wish to use the money for selling this portion for buying my children and family goods from the market on Saturday for Sunday. If you don't agree, please let me know that I may sell some of my goods in order to get your money.

Thank you.

Yours faithfully,
Your brother,

(Sgd) Fotofili Paunga."

The learned Judge dealt with this letter in the passage from his judgment which we are about to cite. First it must be stated that he held appellant had come to some arrangment with Finau, the allotment owner, who did not want respondent on the allotment and who had forbidden him to touch anything on it. This was done by letter Exhibit 3. The learned Judge said:

"The letter (Ex.3) produced two results. First the Plaintiff chased the defendant with a gun for which he was arrested. He then wrote a letter about which there is a dispute. The plaintiff says that the letter Ex.4 was not an answer to the lawyer's letter; he says he wrote a separate letter which the defendant denies receiving. However, to deal with Ex.4 it seems to me quite clear that apart from talk of repaying debts the plaintiff is apologising for what happened - clearly a reference to the gun incident. So the plaintiff is asserting then that he had a share in the plantation. Now the defendant's advocate submits very strongly that even if the plaintiff was originally a shareholder he gave up his share by that letter. However on reflection I do not think that there was any consideration for the promise/nor any intention to create a legal relationship. I think that it was merely an example of the Tongan custom of offering a present to someone one has offended. Anyway the defendant clearly took it like this because after receiving the letter he told the police that he was leaving four hundred plants for the plaintiff. He denies this but I believe the police record and add that this is another example of the defendant's readiness to deny anything that does not suit his case."

To become effective as a discharge of liability on the part of appellant to observe the terms of the partnership and to release him from liability to account to respondent for the assets, such a discharge from liability requires consideration moving from appellant to respondent. This is so unless the letter can be held to constitute a promissory estoppel. In our view there is no such consideration and no promissory estoppel has been proved. It was an attempt to give Leasina Tangitau her husband and children everything on the allotment but the proposed gift was never carried out and has no effect. In our opinion the evidence does not prove that respondent effectively disposed of his share in the partnership property or that appellant was released from his obligations as a partner. The learned Judge came to a correct conclusion when he rejected this defence so ground 3 also fails.

Ground 4 is based on the letter Ex.3. This letter has no contractual effect. It is, however, a piece of evidence which must be considered on the question whether or not there was a partnership contract which is the matter raised in Ground No.1. The fact that no reply was proved does not establish that respondent accepted the letter as correctly setting out their contractual relationship. It is evidence for consideration by the Court together with all other relevant evidence. The learned Judge correctly treated it as such.

We come now to the main issue which is whether respondent established a partnership between himself and appellant for the joint venture of growing vanilla plants on the land of appellant's elder brother. This is purely a question of fact on which there is a conflict of evidence. The learned Judge came to a conclusion that appellant was not a credible witness. He said appellant was ready to deny anything that does not suit his case. The learned Judge expressly said that he found respondent a good and credible witness and gave proper reasons for this finding. On the facts found by the learned Judge he said he had no doubt but that there was a sharing arrangement and that the parties had been working together for several years. To succeed on this ground appellant must first show that the Supreme Court, which saw and heard the witnesses, was wrong in deciding that the evidence of respondent was credible and ought to be accepted and further that the evidence for appellant ought to be rejected where in conflict with that of respondent. The law to be applied on appeal where there has been a finding on fact which includes credibility is now clearly stated. A convenient reference is to the case of Watt or Thomas v Thomas [1947]. All England Law Reports 582, 587 where Lord Thankerton said:-

"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:-

1. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

2. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

3. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

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Applying these principles we are of a clear opinion that appellant has failed to show that we should interfere with the finding of the Supreme Court on the question of credibility. The learned Judge took a full and proper advantage of seeing and hearing the witnesses and gave cogent reasons for his view on credibility. The next issue is whether or not appellant has shown that, accepting the evidence of respondent as true, the finding that there was a partnership was wrong. This appellant has failed to do. We have carefully considered the exhibits together with the oral evidence and all that counsel for appellant has urged. We are satisfied that there was ample evidence to support the finding made and no reason has been established on the principles above stated to cause the Privy 240 Council, sitting on appeal, to disturb those findings. The learned Judge gave careful consideration to all aspects of the evidence and came to a clear conclusion of fact which was supported by ample credible evidence. Such a conclusion ought not to be disturbed on appeal unless it is shown to be demonstrably wrong. Added to this must be the adverse inference which the Court was entitled to draw from the finding that appellant was ready to deny anything which does not suit his case. Ground No.1 fails.

The final question relates to the amount of damages. The burden of demonstrating 250 that the Supreme Court was wrong in its assessment lies on appellant. The general rule on appeal is stated in Davies v. Powell Duffryn [1942] All England Law Reports 657, where Lord Wright said:-

"Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to 260 reverse the trial judge on a question on the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is

> given by Greer, L.J., in Flint v. Lovell (S), at p.360.
> In effect, the Court, before it interferes with an award
> of damages, should be satisfied that the judge has acted
> upon a wrong principle of law, or has misapprehended the
> facts, or has for these or other reasons made a wholly
> erroneous estimate of the damages suffered. It is not
> enough that there is a balance of opinion or preference.
> The scale must go down heavily against the figure
> attacked if the appellate court is to interfere, whether
> on the gound of excess or insufficiency"

Applying these principles we are of opinion that no basis has been shown why the assessment should be disturbed. The learned Judge has not been shown to be in error and there is evidence to support his finding. It was for him to apply correct principles but he was the judge of what evidence should be accepted where there is a conflict. Unless he is shown to be in error his finding must stand. It is not for the Privy Council to make its assessment of damages, our only function is to determine whether or not the Supreme Court was in error on the principles above stated. In our opinion no error has been demonstrated. Ground No.5 therefore fails.

This disposes of all questions raised except that appellant contends that he is entitled to claim certain expenditure. This action was based on the wrong known as conversion. If a member of a partnership does any act in relation to partnership property which can be justified only by the right to exclusive possession then he is liable in damages for wrongful conversion of such property: Baker v. Barclay's Bank [1955] 2 All England Law Reports 571, 576. The measure of damages is proportionate to interest in the partnership asset. The present action is completely independent from any question of accounts or other claim between the partners. It is a claim for a share of the value of the partnership's assets wrongly abstracted from the partnership. The rights of either members of the partnership can still be enforced, so if appellant considers he is entitled to any relief he can bring an appropriate action for that purpose. Appellant may have been entitled to counterclaim but he has not done so, and, accordingly no deduction from this award can be claimed on the pleadings as they now stand. Of course, appellant denied a partnership so it would have been perhaps embarrassing to bring a counter-claim on the basis of the existence of a partnership. If he has any rights they are not affected except on the issue already tried.

The appeal will be dismissed. Each party to pay his own costs. The judgment of the Supreme Court is affirmed.