Privy Council Appeal No. 6 of 1951

Ng See Hem - - - - - - - - - - - *Appellant*

v.

The Official Assignee Federation of Malaya - - - *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER 1952

Present at the Hearing:

LORD PORTER
LORD NORMAND
LORD COHEN

[*Delivered by* LORD PORTER]

In this case the arguments for the allowance of the appeal have been put forward with vigour and with ability by Lord Hailsham in a matter which contains certain elements of difficulty. The defendant was defeated both in the court of first instance and in the Court of Appeal and their Lordships did at one stage in the argument suggest that there might have been concurrent findings of fact in the Malayan Courts which would be fatal to the success of the appeal. They are, however, not proposing to consider the matter from this angle nor to say that this is a case in which the concurrent findings rule comes into force. They have been persuaded that that should not be a ground of decision, particularly in a case in which it has not been fully argued. Therefore it remains to consider what view is to be taken of the judgment of the judge of first instance.

The action is an action brought by the Official Assignee of the estate of Mr. Lim Ah Hooi, who is now a bankrupt. Mr. Lim Ah Hooi was the original plaintiff, and his action was brought upon a promissory note dated in the year 1946 and bearing the date 27th October, and stamped on 28th October at Ipoh, which is some distance from the place where it is said that the note was made. If the note was a genuine note, apart from a question which one will have to consider, namely the point as to whether it is correctly stamped, the plaintiff must succeed ; but in order to do so he must establish that the note is a genuine one ; the onus is upon him to do so.

So far as the question of stamping is concerned, the note bears the appropriate stamps, but it is said that there is a regulation that the document must be either stamped when made or else it must be stamped within three days, and if stamped within three days it has to bear upon the document "stamped in due time" ; and must be verified by the collector's signature or initials.

Again, their Lordships refrain from pronouncing upon what the exact procedure must be when a note is made because no point was taken upon it in the court below, and, indeed, in the case presented to their Lordships, it was not taken as establishing that the document was defective but merely as one of various cumulative grounds from which it was said it must be inferred that the note was not a genuine one.

The actual question as to what superscription the note must bear, whether it is sufficient that it is properly stamped or whether in addition

to that there must be added " stamped in due time " with the initials or signature of the collector, must be left open to be argued in some case when it directly arises and when it has been taken in the court below. At the moment their Lordships say neither one thing nor the other. They neither say that the document is ineffective unless it bears " stamped in due course " with the collector's verification, nor do they say that it might be effective provided that it is stamped with the proper stamps. They merely rule that the point is not one which in the circumstances is now open to the appellant.

Their Lordships however bear in mind the argument which has been presented to them, that the fact that it is not stamped with the words " in due course " and initialled is one of many reasons why, as it is said, the document should be regarded with suspicion.

The story is a curious one. The plaintiff says that he had collected some 60,000 dollars' worth, presumably of notes, during the Japanese occupation, and had buried them. He says that he was afraid at that time that a secret society, the Ang Bin Hoay Society, might blackmail him, or that the Japanese might make demands upon him. He therefore determined to ensure the safeguarding of the notes by transmitting them to the first defendant.

A good deal of criticism has been made as to the probability of such an action being taken by him. It is said that there is no reason why, if he had the money safely in the ground, he should give it to another who might himself be subject to blackmail and might well be discovered holding the notes.

Their Lordships do not feel themselves able to evaluate the exact force of that argument, because they are not familiar with conditions in the Straits Settlements at the time at which the transaction took place. It may be that the plaintiff was afraid either of failing to find the spot or of the notes disintegrating, or of somebody digging up and stealing the notes, and therefore sought to pass them on to some rich man who would not be suspected of having added to his store of money by means of this transaction.

Thereupon, according to the plaintiff's story, he approached the first defendant and entrusted the notes to him for safe keeping. Again, it is pointed out that there are some difficulties with regard to the acceptance of that story, namely that it gives no reason for the issue of a promissory note and gives no reason for the addition of a second name to the note itself. Again, their Lordships are not sufficiently familiar with conditions to say that those considerations ought to have any great weight. It may be that the promissory note was taken because a mere receipt would not be safe, and it may be that the second signer was brought in in order that he might himself be liable and therefore interested in testifying that the note had in fact been made by the appellant. However that may be, their Lordships are not, owing to their lack of knowledge of the conditions, capable of estimating the strength or weakness of the suggestion.

Apparently, from that date until 1948 no steps were taken to enforce the note. There is certainly no evidence of any claim in writing before the action was brought, though there is evidence that oral demand was made for payment on behalf of the plaintiff—evidence which is denied by the defendant.

When the action came to be brought, the defendant denied that he had ever given a note, and maintained that it was a forgery. Upon that allegation, evidence was given, first of all by the plaintiff himself and then by two gentlemen, a Mr. Sawall and a Mr. Kong, both of whom spoke to the fact that the defendant had in substance acknowledged his indebtedness on the note and, indeed, at one time had endeavoured to obtain, or had been prepared to accept, a compromise. That evidence was challenged because it was said that the story of the two gentlemen differed to some extent one from the other, and, further, that it differed

from certain affidavits which they had made with regard to the transaction.

Their Lordships are not greatly impressed by either argument. In the first place, the kind of difference which is sought to be made between the two stories mainly turns upon the question which of the two gentlemen called in the other when, as they said, a question of compromise was under discussion. Such a difference is itself of little moment and, so far as the affidavits are concerned, it seems to their Lordships that they were adequate for the purpose for which they were given, namely for the purpose of trying to prevent the danger, which was thought might exist, of the defendant selling his estate and departing out of the colony. The affidavits did not purport to deal with the case generally or to give an account of what had taken place, other than for that purpose.

It is true that a good deal of evidence was given by these gentlemen as to conversations and incidents which was inadmissible, but it was not objected to, and, indeed, in itself had little corroborative force, nor does it appear from the judgment that the learned judge placed any reliance upon it.

Finally, in criticism of the evidence given on behalf of the plaintiff, it is said that the note itself should be suspect, because it fails to have upon it the verification of the collector's signature or initials or the superscription that it was stamped in due time. Again, their Lordships do not feel, owing to their lack of knowledge of the conditions and of the practice in the colony, that they ought to rely upon that as a serious reflection upon the genuineness of the note.

There then comes the question, which was the main question argued on behalf of the appellant, namely, as to whether the learned judge approached the matter from the wrong angle and with a wrong notion of where the onus lay. It is clear that he could not make up his mind from the appearance of the note itself whether it was genuine or not. He had before him a number of genuine signatures of the defendant, but he was quite unable to say whether this particular signature was or was not genuine; it left him with no inclination either way. Therefore he was thrown back upon the evidence of the witnesses called for the two parties.

The defendant was called in order to rebut the claim and totally denied that he had ever made the note or that he knew anything about it, or that he had heard about it until the action was brought. Admittedly that was a matter which it was incumbent upon the learned judge to take carefully into consideration in making up his mind.

In addition to the matters already referred to there was one further piece of evidence which ought to be mentioned—viz.:—the statement made by the plaintiff that he had had previous dealings with the defendant and that the defendant had sworn an oath, which presumably was to the effect that he would be faithful and just in his dealings with the plaintiff. That story is to some extent, although not entirely, borne out by the evidence of a witness who spoke to the making of a previous 5,000 dollar note and of its repayment by the respondent. That evidence is challenged because the witness in question speaks only of a 5,000 dollar note, whereas there is also evidence of a 2,000 dollar note being made, and it is said that he may well have made a mistake because the 2,000 dollars were spread between four persons who had made themselves each responsible for 500 dollars and the witness may have confused the 500 with the 5,000 dollars. He himself, however, said that he was sure that he had not made a mistake.

At its best the evidence of this witness is of small importance. If true it might be regarded as some ground for saying that the defendant was not telling the truth. In their Lordships' view, however, that suggestion, like so much else of the criticism made the other way, is of small account and should not be taken too gravely into consideration.

Ultimately the question becomes: Did the learned judge, when he came to make up his mind, start with the theory that the note was

a good one and that the onus was on the defendant to show that it was false, or did he rightly regard it from the proper point of view, viz.:— the note has to be proved to be genuine, it is for the plaintiff to establish that fact and he has established it.

In this as in other cases their Lordships deprecate too great a reliance upon the question of onus. Onus, as their Lordships have said before, is an important matter when there is a doubt as to which side should be believed and no evidence, or no sufficient evidence, to establish the allegations of one side or the other has been given ; but in this case the testimony given on behalf of each party has been fully heard, and the learned judge had evidence before him on both sides and had to make up his mind upon it. Therefore no question of onus arises and the issue turns upon what is meant by the language used in the judgment and what can be gathered from it as to the approach which the learned judge adopted towards the solution of the question before him.

Their Lordships are of opinion that he approached the problem from the right angle. He found himself unable to make up his mind from the note itself, and therefore he was compelled to determine the matter upon the evidence which was given before him. On page 19 of the record he says: "I think it is sufficient for me to say on the question as to whether the promissory note signature is a forgery or not, that, though I cannot rule out the possibility of it being a forgery, I am quite unable to say that it is one from my detailed examination of all the signatures. I have therefore very carefully to consider the plaintiff's evidence and that of his witnesses." Then he goes on: "The plaintiff's story is an unusual one, so much so that in normal times and circumstances one would be inclined to reject it out of hand. But for too long now conditions in this country have been far from normal and it is in the light of the abnormal conditions prevailing at the time that the plaintiff's case must be considered."

Their Lordships think, on reading that portion of the judgment, that the learned judge had carefully in mind the difficulty of the story, that he had critically to consider the plaintiff's evidence, and that the plaintiff had to establish that the note was a genuine one. They have also borne in mind the fact that the conditions in the Straits Settlements were much better known to the learned judge than to those who like themselves have no experience of what those conditions were

The learned judge, having made the remarks quoted above, goes on to say, at the end of his judgment: "After due consideration I have come to the decision to accept the evidence of the plaintiff and his witnesses. I find as a fact that he did hand over 60,000 dollars to the defendant and that the defendant did sign the promissory note for this sum." That in itself, subject to any criticism that the learned judge had not dealt adequately with the matter, would be fatal to the appeal, and indeed it is acknowledged that it would be fatal unless the learned judge came to his decision on a wrong view as to the onus of establishing the question of whether the note was or was not a genuine document. The learned judge, however, clearly states that his decision is based upon his acceptance of the evidence of the respondent's witnesses and the Court of Appeal so interpreted his finding. They say: "The learned trial judge stated that the main reason for his decision was the opinion he had formed of comparative reliability of the witnesses. This is an advantage not possessed by this court and in the circumstances I am of the opinion that this court is 'not in a position to come to any satisfactory conclusion' on the written evidence." In other words, the Court of Appeal, like the learned trial judge, were baffled by the mere perusal of the documents in the case, but took the view that the learned judge had considered the evidence of the witnesses and come to his opinion upon an observation of their demeanour and a scrutiny of their evidence.

Their Lordships are in agreement with the Court of Appeal in thinking that that is a true interpretation of the judgment which the learned judge delivered, and on that view, find no ground on which they would be justified in differing from it and will humbly advise Her Majesty to dismiss the appeal. As the respondent has not been represented, there is no question of costs to be dealt with.

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In the Privy Council

NG SEE HEM

v.

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DELIVERED BY LORD PORTER

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