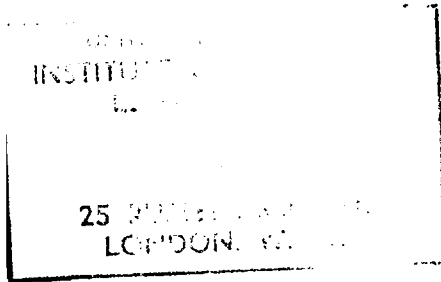
24/1963

IN THE PRIVY COUNCIL No. 24 of 1962

O N A P P E A L

FROM THE FEDERAL SUPREME COURT OF NIGERIA



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G. O. LAJA

v.

M. A. OKUPE

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

IN THE PRIVY COUNCIL No. 24 of 1962

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF NIGERIA

B E T W E E N:-

G. O. LAJA Appellant

- and -

M. A. OKUPE Respondent

CASE FOR THE APPELLANT

Record

1. This is an appeal from the judgment and order of the Federal Supreme Court of Nigeria dated the 16th day of March 1961, whereby the judgment of the High Court of Lagos dated the 7th day of December 1959, which had dismissed a suit brought by the Respondent herein, was reversed and judgment entered for the sum of £10,047.5.0. (pp 33-39; pp 25-27)

2. The Respondent's claim against the Appellant was for the sum of £10,047.5.0. as money paid by the Respondent to the Appellant for a consideration that had wholly failed. The Respondent in his Statement of Claim alleged that by an agreement made in the year 1955 the Appellant had agreed to supply the Respondent with 10,000 tons logs for export, delivery being by instalments to one Abdul Raheem Ligali for shipment for and on behalf of the Respondent and that payment would be made to the Appellant after the delivery of the logs had been confirmed by the said Abdul Raheem Ligali to the Respondent. It was further alleged that between December 1955 and August 1956 the Appellant and the said Abdul Raheem Ligali had falsely misrepresented to the Respondent that 1,508 tons logs had been delivered to the said Abdul Raheem Ligali and that the Respondent had paid by various cheques the total (pp 12-13)

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sum of £10,047.5.0.; that no logs having been delivered the Appellant had induced the Respondent to part with the said money under false pretence and that despite repeated demands the said money had not been repaid to the Respondent.

pp 19-20 3. By his Defence the Appellant denied the said agreement and averred that the Respondent and the said Abdul Raheem Ligali arranged with logs men for the supply of logs to the said Abdul Raheem Ligali and the Appellant merely accepted instructions from the Respondent from time to time to pay the monies represented by the cheques to men who according to the Respondent had delivered logs to him or to Abdul Raheem Ligali on his behalf.

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pp 22-24 4. At the hearing in the High Court of Lagos the Respondent giving evidence alleged the said agreement and that from time to time the Appellant telephoned him that logs had been delivered to Ligali and that after the telephone conversations the Respondent paid the Appellant cheques totalling the said sum of £10,047.5.0. He further said that on inquiry the Appellant told him that the logs had been delivered to Ligali who had shipped them to Oslo and he subsequently discovered that this was not true. Under cross-examination the Respondent agreed that he and Ligali were directors of Ligali Commercial Syndicate Limited and that he had supplied a lot of money (£30,000) direct to Ligali to pay the Appellant whenever Ligali reported that the Appellant had supplied logs, this money having nothing to do with the money claimed in this action. He admitted that Ligali had paid him about £62,000. He said that the price of logs varied between £4 and £5.10.0. per ton and that as far as he knew the Appellant had delivered no logs and none were shipped by Ligali.

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p 24
ll 20-28 5. The Appellant did not give evidence and called no witnesses, but Counsel submitted on his behalf that as the Respondent had received £62,000 in respect of the 10,000 tons logs it could not be said that consideration had wholly failed.

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pp 25-27 6. The learned Chief Justice in his judgment upheld the submission of the Appellant's Counsel in that since the Respondent had received some benefit from the transaction consideration could not have been said to have wholly failed. He said:

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p 26 l 27 -p 27 l 7

"The plaintiff cannot, in my view, have it both ways. He cannot both retain the £62,000 and claim over and above the return of the payments he has made under the contract. There is another reason why this claim in the form in which it is made cannot suceed. In an action for the return of money on the ground of failure of consideration a plaintiff is only entitled to recover what he has paid and no more. If he has received any payment in respect of the transaction such payment must be deducted in order to ascertain what is due to him. In the present case it is not known for certain how much the plaintiff paid for the non-existent logs.

The evidence itself only refers to two total payments of approximately £30,000 to Ligali, and £10,047.5.0d. to the defendant. Since the plaintiff has received £62,000 which he still retains it has not, in my view, been established that anything is owing to him. It may be that the plaintiff has a good claim in damages against the defendant or some other action against Ligali but it seems to me that the present action in its present form cannot succeed."

The case was dismissed with costs.

7. The Respondent appealed to the Federal Supreme Court of Nigeria which allowed the appeal and entered judgment for the Respondent for £10,047.5.0. and costs in both Courts.

8. Bairamian, F.J. in the judgment of the Court held:

p 36 l 15 -p 38 l 7

"There was confusion in this case, which apparently arose in this way. The plaintiff was embarking on an enterprise which involved him in two separate and distinct contracts - one of sale, with the defendant, and another of agency with Ligali; the defendant was to supply 10,000 tons of logs; Ligali was to take delivery and ship the logs to Europe; and the plaintiff has kept apart his rights

against each of them under his respective contract. As both contracts related to the same 10,000 tons of logs, it was perhaps a natural slip to speak of them as one "transaction" of 10,000 tons of logs. Another factor which perhaps contributed to the confusion was the fraud practised by the defendant and by Ligali apparently helping each other in representing to the plaintiff that the defendant had supplied logs - which enabled Ligali to pretend that he was shipping or had shipped them. Thus, although there were two separate and distinct contracts, the defence fused them into one "transaction" in the cross-examination of the plaintiff, as if it had been a case of one contract only between the plaintiff on the one hand and, on the other, the defendant and Ligali, and argued that the plaintiff could not sue the defendant for money had and received on a consideration which failed totally. That presentation and argument was unwarranted, but it succeeded and the confusion having been created, as I must with respect say, it pervades the judgment, which proceeds to say that, as the plaintiff received some benefit from the transaction, i.e. £62,000, the consideration cannot be said to have wholly failed, and that the plaintiff cannot both retain the £62,000 and claim over and above the return of the payments he has made under the contract. For that view the judgment quotes a passage from Halsbury's Laws of England, 3rd edition, vol. 8, para. 421, which states that :-

"A complete failure of the consideration of a contract occurs where one of the contracting parties fails to receive some benefit or valuable consideration which springs from the root and is in the essence of the contract. If, however, he once received such a benefit then he has no remedy in this form of action.

With respect to the learned authors, I agree: But I believe that they have in mind the parties to the contract and none others. Two cases may be cited to illustrate that statement of the law.

In Rowland v. Divali 1923, 2 K.B. 500, the plaintiff bought a car from the defendant and had it to use for a time; but it belonged to another, to whom he had to return it; his contract being for the purchase of the car, as he did not get what he had bargained for, namely the property in the car, he was held entitled to claim his money back.

10 In Hunt v. Silk, 1804, 5 East, 449, the defendant, in consideration for £10, agreed to give the plaintiff immediate possession of a house, make some repairs, and execute a lease within ten days. The plaintiff paid the £10 and went into possession, and continued in possession beyond the ten days, and then he vacated the house on the ground that the repairs were not made and the lease was not executed within the ten days;

20 and he sued the defendant for the return of the £10. He lost because he had derived some benefit by the intermediate possession of the house.

Both cases deal with a contract between plaintiff and defendant. Such is also the case in hand: the plaintiff bargained with the defendant for the supply of logs, paid him for a number of pretended deliveries which the defendant, told the plaintiff he

30 had made, but got no logs; he is entitled to claim back from the defendant the money he paid him for those particular bogus deliveries. The argument for the defendant, that the plaintiff has not been completely disappointed as he has received £62,000 from Ligali, merely creates confusion and clouds the issue in the present case.

The question in the present case cannot

40 be affected by Ligali's payment. I think that the plaintiff was entitled to sue the defendant and should have had judgment. Accordingly I would allow the appeal and enter judgment for the plaintiff for £10,047.5s.0d. with costs here and below; the costs in this court to be forty guineas, and those below to be taxed."

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9. Final leave to appeal to Her Majesty in Council was granted by the Federal Supreme Court of Nigeria on the 23rd day of October, 1961.

10. The Appellant humbly submits that this appeal should be allowed with costs and the order of the trial judge be restored for the following among other

R E A S O N S

1. BECAUSE the learned chief justice was correct in treating the whole transaction as one entity and the Federal Supreme Court were wrong in holding that there were two separate and distinct contracts.

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2. BECAUSE the Respondent having received the sum of £62,000 there had been no total failure of consideration.

3. BECAUSE the Respondent had failed to establish any grounds in law for his claim to the return of the said sum of £10,047.5.0.

THOMAS O. KELLOCK

IN THE PRIVY COUNCIL No. 24 of 1962

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