Privy Council Appeal No. 35 *of* 1962

Nathaniel Stuart Chalmers – – – – – – *Appellant*

v.

The Fiji Kisan Sangh – – – – – – – *Respondent*

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY 1964

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD MORRIS OF BORTH-Y-GEST.
LORD GUEST.
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal, by leave of the Fiji Court of Appeal, from a judgment of that Court, dated the 14th June 1962, by which it was ordered that the judgment of the Supreme Court dated the 1st September 1961 be set aside and that a new trial be had between the parties. The appellant was at the material times the President of an Industrial Association called The Fiji Kisan Sangh which was registered under the Industrial Associations Ordinance. That Association, the respondent to this appeal (in this judgment to be referred to as the plaintiff), commenced an action against the appellant, (who will be referred to as the defendant) in the Supreme Court of Fiji by writ dated the 7th April 1959. The action related to certain sums of money drawn by the defendant upon a bank account with the Bank of New South Wales. Funds had been raised for the construction of a building and those funds had been placed to the credit of the bank account. The defendant was authorised by the plaintiff to operate the account. Shortly stated the claim and contention of the plaintiff was that the defendant had improperly drawn certain cheques upon the account and had applied the proceeds for his own use.

On the writ (dated the 7th April 1959) the first claim (and the only one now material) which was endorsed was for an account and repayment of all moneys improperly drawn by the defendant from the plaintiff's Building Fund Account with the bank between the 19th February 1954 and the 5th April 1957. The issues (so far as now material) which were raised by the subsequent pleadings in the action were as follows. It was alleged by the plaintiff that the plaintiff had an account with the Bank of New South Wales Lautoka styled " Kisan Sangh Building Fund Account ". The defendant admitted that he opened that account but alleged that he did so as Trustee for the several donors of a fund known as " Kisan Sangh Building Fund ". It was common ground that at the time relevant in the action (i.e. between the 19th February 1954 and the 18th April 1957) the said Kisan Sangh Building Fund account was a trust account operated solely by the defendant as sole Trustee and that between the stated dates the defendant drew a number of cheques as recorded in a list (list B) attached to the statement of claim. The cheques were in total of the amount of £3,752 15*s.* 5*d.* The difference between the parties was that the plaintiff asserted that the defendant was under the duty of accounting to the plaintiff association whereas the defendant asserted that he was only obliged to account to the donors of the Fund.

Paragraph 8 of the statement of claim was in the following terms:—

> " The Plaintiff states that the said cheques listed under Part B and totalling the sum of £3,752 15*s*. 5*d*. were improperly drawn by the Defendant and the proceeds thereof applied by the Defendant for his own use or in payment of accounts not incurred authorised or approved by the Plaintiff ".

In reply to that paragraph the defendant pleaded that all the cheques drawn by him as shown on list B were properly drawn by him in accordance with the authority and wishes of the donors of the Fund. He also pleaded that the plaintiff was " not entitled in law " to say that the cheques were improperly drawn by the defendant. The defendant further pleaded that the action had been instituted without the authority of the duly constituted Executive Committee or Central Board of the plaintiff and that the purported office-bearers of the association had not been duly elected. The main claims in the statement of claim, so far as now material, were formulated as being for:—

> " 1. The sum of £3,752 15*s*. 5*d*. improperly drawn by the defendant out of the said Building Fund Account or such lesser sum as the defendant is found to have improperly withdrawn or misappropriated from the said account.
>
> 4. Such further or other relief as to this Honourable Court seems meet ".

The action came on for trial before Knox-Mawer J. in the Supreme Court of Fiji on the 11th August 1960. The Court was informed by counsel that the plaintiff was not seeking an order for accounts but sought an order for the recovery of the moneys in question on the basis that they had been misappropriated by the defendant. After certain evidence had been called on behalf of the plaintiff on that day and on the 12th August and on the 15th August the defendant (who after the 11th August conducted his case in person) submitted that he had no case to answer. He left it to the Court to decide whether he should be called upon to defend. The learned Judge declined to rule on the submission unless the defendant made his election as to whether to call any evidence. The learned Judge considered however that the case could not be satisfactorily concluded unless and until certain accounts and inquiries were directed to be made. He therefore made an order (on the 15th August) that in default of agreement between the parties the Registrar of the Court should appoint a fit and proper person to inquire into all financial transactions relating to the Fiji Kisan Sangh Building Fund and to file in writing a complete report thereon to the Court. From that order the defendant appealed to the Court of Appeal. Amongst his grounds of appeal was the contention that the learned Judge was wrong in proceeding to order an inquiry for accounts without determining whether or not the defendant was the sole trustee of the donors and as such bound to account to them and not to the plaintiff. There was a further contention that there were such insufficiencies of evidence that the learned Judge ought to have dismissed the action. The judgment of the Court of Appeal was given on the 3rd May 1961. The Court held that there had in fact been no judgment in the case and that the order that the learned Judge had made was in effect an interlocutory order from which appeal only lay to the Court of Appeal by leave. The judgment of the Court of Appeal proceeded as follows:—

> " We have heard Counsel for both sides on the matter and they have agreed that before an account is ordered in this case the trial Court should first arrive at findings of fact and determine the issues arising on the pleadings.
>
> In these circumstances we have granted leave to the appellant to appeal from the Interlocutory Order made in this case and make the following direction by consent.
>
> The order of the learned trial Judge dated 15th August, 1960, directing inquiries into accounts and matters incidental thereto is set aside and the action is remitted to the court below for the learned trial Judge to proceed with the hearing of the action.

> We do not feel that an order for an account should be made unless and until the learned trial Judge has decided, after hearing all the evidence, whether the action was properly instituted; whether the defendant is accountable to the plaintiff Association; and whether he then considers such an order should be made ".

It was ordered that the costs of the appeal should be costs in the cause and should abide the result of the trial of the action.

The case went back therefore to the Supreme Court and on the 16th August 1961 the hearing was resumed and continued before Knox-Mawer J. The learned Judge accordingly had to decide, after hearing all the evidence which either party wished to adduce, (1) whether the action was properly instituted (2) whether the defendant was accountable to the plaintiff Association and (3) whether an order for an account should be made.

In August 1960 the plaintiff had called the following witnesses (*a*) Mr. Bentley, a member of the staff of the Bank of New South Wales, (*b*) Mr. Bayly, who became President of the plaintiff Association in March or April 1959, (*c*) Mr. Shiu Nath, the assistant secretary of the plaintiff Association who was acting secretary in 1952, and (*d*) Mr. Ghasi Ram Bhola, who was elected treasurer of the plaintiff Association in March 1959. Counsel for the plaintiff had stated on the 12th August 1960 that he did not intend to call Mr. Prasad the general secretary of the plaintiff Association but that he did intend to call Mr. Bhola and also Mr. Richmond who had been treasurer of the plaintiff Association in 1956. At the resumed hearing on the 16th August 1961 the defendant complained that Mr. Richmond had not in fact been called in August 1960. Counsel for the plaintiff stated that Mr. Richmond had been in Court but had not been called because it had been discovered that he was present as a witness for the defendant. The learned Judge at the resumed hearing on the 16th August 1961 directed that Mr. Shiu Nath should be recalled so that he could be further cross-examined by the defendant. He was so recalled. At the end of the evidence of Mr. Shiu Nath the defendant said that he was not calling any evidence. He made his submission abundantly clear. It was that he was under no liability to account to the plaintiff Association because, as he contended, he was a trustee not for the Association but only for the donors of the fund. He said that the fund had not been raised by a levy on the members of the Association but by donations and that not all the members had subscribed. His attitude was expressed in the words " there is no unwillingness upon my part to account for every penny . . . provided it is clearly understood that I am not accounting to the Association I will sit down with an accountant and prove exactly what the money was used for ".

In the course of the hearing the plaintiff withdrew certain cheques from the claim. There was no submission that an account should be ordered. The contention of the plaintiff was that the evidence before the Court was sufficient to entitle the plaintiff to judgment for the sum claimed (less the items withdrawn) and particularly so in the absence of any evidence negativing the view that the cheques had been improperly drawn and had been applied in unauthorised ways.

At the conclusion of the second hearing (on the 1st September 1961) the learned Judge gave judgment. He based his judgment both upon the evidence given at the first hearing before him and upon the evidence given at the second hearing. He recited certain facts which now call for mention. Rule 17 of the constitution (adopted on the 18th November 1951) of the plaintiff Association provided that the management and control of the Union's affairs should be in the hands of an Executive Committee referred to as the Central Board and Rule 24 provided for the banking of all monies received by the Union. Rule 24 provided that " such banking account shall be operated upon the authority and signature of such officials and officers as are appointed by the Central Board. By resolution of the Central Board any funds of the Union may be employed in connection with any one or more of the objects of the Union and the Board shall also have power to make a levy on members for that purpose if circumstances should so require ".

On the 1st June 1952 the following resolution was passed:—

> " At a meeting of the Central Board (Executive) it is resolved that the meeting authorise the President, Mr. Nathaniel Stuart Chalmers, to open a special Bank account with the Bank of New South Wales, Lautoka, to be called the KISAN SANGH BUILDING FUND ACCOUNT and that all monies subscribed by members to the said Fund be paid to the credit of that fund which shall include payments on Assignments made by members in favour of the Kisan Sangh through the Colonial Sugar Refining Company Limited and that the only person authorised to operate on the said account shall be Nathaniel Stuart Chalmers, the President, or such other person or persons as may be by him authorised in writing so to do. It is further resolved that the said Nathaniel Stuart Chalmers shall have authority to place any of the said Fund subscribed as aforesaid in the Government Savings Bank to the credit of an account in the same name, namely, the KISAN SANGH BUILDING FUND ACCOUNT, and the said Nathaniel Stuart Chalmers shall for all purposes be authorised to open such an account and he alone or such other person or persons by him authorised in writing shall be permitted to withdraw any monies placed to the credit of such account.
>
> (Sgd.) N. S. Chalmers.
> *President*
>
> (Sgd.) Shiu Nath
> *Secretary* "

The plaintiff Association lodged a notice (dated the 2nd June 1952) with the Bank opening a special banking account in the name of the plaintiff and styled " The Kisan Sangh Building Fund Account " and the notice authorised the defendant, as President, solely to draw cheques upon the account. Money was subscribed to the Building Fund by members of the plaintiff Association. The defendant operated the account, as indeed he was authorised to do, down to 1957. The building was erected. The defendant stated that the money had been properly applied and had been applied in accordance with the authority and wishes of the donors of the fund.

In reference to the specific matters which the Court of Appeal had directed the learned Judge to decide his conclusions were as follows:— (1) that the action was properly instituted and (2) that the defendant was accountable to the plaintiff Association in respect of the disputed items in List B. He held that the Fund was clearly the plaintiff's money. As to the third matter (i.e. whether if the defendant was accountable an order for an account should be made) the learned Judge said:—

> " Learned Counsel for the plaintiff has asked me to award judgment forthwith for the whole amount claimed. However, having regard (*a*) to the defendant's assertion quoted above, (*b*) to the wide authority in operating this fund originally given to the defendant by the plaintiff-Union, and (*c*) to the details given at least on some of the disputed cheques, I think justice requires me to allow the defendant a final chance to account for the monies itemised in List B ".

He proceeded to order that the defendant should within 28 days " account to such qualified accountant as the Registrar of this Honourable Court shall name as a special referee and to the satisfaction of such special referee that the monies represented by the cheques itemised in List B filed with the statement of claim herein (excluding Item 770) were properly applied by the defendant on behalf of the plaintiff Union with liberty to the plaintiff Union to move for judgment against the defendant for such amount, if any, as the special referee's report states has not been satisfactorily accounted for ". He ordered that the defendant should in any event pay to the plaintiff all costs incurred by the plaintiff to the date of that order.

From that judgment the defendant again appealed and the plaintiff cross-appealed. The contention of the defendant was that the learned Judge was wrong in directing an account and that he should have dismissed the

action. The contention of the plaintiff was that the learned Judge should have entered judgment for the plaintiff and should not have made an order for an account inasmuch as no order for an account had been prayed for in the statement of claim.

The appeal and the cross-appeal were heard by the Fiji Court of Appeal (Hammett, Acting President, Marsack and Trainor, Judges of Appeal). Judgment was given on the 14th June 1962. By a majority (Trainor J. A. dissenting) the Court ordered that the judgment given on the 1st September 1961 should be set aside and that a new trial before another Judge be had between the parties. The view expressed by the learned Acting President was that the special referee to be appointed had been given insufficient directions as to the basis upon which the account ordered should be taken and that it should not have been left to him to decide whether the items of expenditure referred to him had been either properly or improperly expended. A decision was needed on the question not only as to the power of the defendant to operate the bank account but also on the question whether the defendant had power to direct the specific purposes and amounts for which payments should be made or whether he could only make such payments as the Association by resolution of its Central Board should direct should be made. The learned acting President considered that if the learned Judge had directed that the special referee should merely inquire and report to him the purpose for which the item in List B had in fact been expended such an order might well have been a proper order to make. The view of Marsack J. was the same. He thought that the questions which had to be determined in order to effect substantial justice were the following:—(*a*) what was the extent of the defendant's authority to expend the moneys entrusted to him and (*b*) to what extent were those moneys expended within the scope of the defendant's authority. He considered that those questions should be judicially determined and not left to the decision of a referee. He concurred in the view that there should be a trial de novo before another Judge. The order made by the Court was that the Judgment of Knox-Mawer J. of the 1st September 1961 should be set aside and that a new trial be had between the parties and that no order for costs in respect of the appeal should be made.

The dissenting judgment of Trainor J. A. indicated a different conclusion as to the best way to deal with the situation. He pointed out that the learned trial Judge had held that the proceedings were properly instituted and that the Kisan Sangh Building Fund belonged to the plaintiff Association and that the defendant was accountable to it and that the Judge had made an order which afforded the defendant an opportunity of explaining the items in List B after removing therefrom those which the plaintiff admitted represented payments for the benefit of the plaintiff. Trainor J. A. said that it was clear that the learned trial Judge had come to the conclusion that the cheques in List B had been improperly drawn in that there had not been compliance with the requirements such as the passing of the necessary resolutions. The same had been true in regard to the cheques in List A but in regard to them it was known what had happened to the proceeds and so no claim had been made. Holding that on the evidence and on the documents the learned trial Judge was left with no other possible logical conclusion than that the Building Fund belonged to the plaintiff, Trainor J. A. said:—

> " I think the learned trial Judge made a noble effort to effect justice in this case but I feel that this end might have been better achieved had he in the circumstances of this case indicated to the appellant that he had a case to meet in respect of the items remaining in List " B " after the deductions. With great respect to the able and very patient trial Judge I am of the opinion that in the circumstances of this case he erred in appointing a special referee, to whom the defendant must account, with powers to decide which sums are and which sums are not (if any) due by the appellant. It is my opinion that these are matters on which it was desirable for the trial Judge to adjudicate.
>
> I am of the opinion, however, that the judgment of the Court below should be upheld save that portion which appointed a Special Referee and ordered the appellant to pay all costs ".

Trainor J. A. would therefore have remitted the case once more to the Court below with directions (inter alia) to hear such evidence as the defendant might adduce in respect of the remaining items in List B with permission to the plaintiff to cross-examine or call rebutting evidence and to order judgment for the party in whose favour there is a balance or for the defendant if there is no balance.

The defendant having obtained the leave of the Fiji Court of Appeal to appeal now submits that the order of the Court of Appeal should be set aside and that the claim of the plaintiff should be dismissed. Shortly stated the contention of the defendant before their Lordships' Board was that the plaintiff had chosen not to claim an account and had set out to claim a sum of money as representing amounts which in breach of trust had been misappropriated and that the plaintiff had wholly failed to prove his claim and that accordingly it ought to have been dismissed.

The plaintiff had not obtained the leave of the Fiji Court of Appeal to appeal against their order but in his printed case presented to their Lordships' Board he submitted that the judgment of the Court of Appeal should be set aside in so far as it directed a new trial and that judgment should be entered for the plaintiff for the balance of the amount claimed (£2,609, 1*s.* 8*d.*) or alternatively that the order of the learned trial Judge should be restored or in the further alternative that the judgment of Trainor J. A. should be upheld and that an order be made as proposed by him. Their Lordships gave leave to the plaintiff to petition for special leave to cross-appeal in order to present these submissions and their Lordships intimated that they would humbly advise Her Majesty to accede to such petition.

As already recited the Court of Appeal by their judgment of the 3rd May 1961 directed the learned trial Judge to make decisions, after hearing all the evidence, in regard to certain specific issues. One of these issues was as to whether the action was properly instituted. By his judgment of the 1st September 1961 the learned Judge held that it was. There was evidence which warranted this conclusion. Their Lordships see no reason to interfere with this finding and see no reason why this issue should be the subject of a re-hearing. Another issue was as to whether the defendant was accountable to the plaintiff in respect of the sums drawn out of the bank account by the cheques recorded in List B. By his judgment of the 1st September 1961 the learned Judge decided that issue. He held that the defendant was accountable to the plaintiff. Their Lordships see no reason to disturb this finding. The resolution of the 1st June 1952 amply supported it. The resolution was passed at a meeting of the Central Board (Executive) of the plaintiff Association and the resolution authorised the defendant to open the Building Fund Account as a special bank account. All monies subscribed by members of the Association to the Fund were to be paid to the credit of the Fund. The defendant was authorised to operate the account. Their Lordships reject the submission that he only had obligation to account to the particular donors. His obligation was to account to the Association and their Lordships see no reason why this issue should be the subject of any renewed argument at a further hearing. Their Lordships consider that Trainor J. A. was well warranted in saying in his judgment:—

> " I think it can be safely said that the evidence adduced by the respondents in establishing their claim was scanty and badly presented but a close analysis of it and particularly the admitted or non disputed documents and the fact that no contrary evidence was adduced left the Judge with no other possible logical conclusion than that the Building Fund belonged to the respondents. Furthermore the oral evidence, unsatisfactory though much of it was, coupled with the admitted or non disputed documents clearly established that the payments shown in List " B " had been irregularly made. In these circumstances the learned trial Judge was in my opinion entitled, in the absence of anything to the contrary from the appellant, to find that the appellant was accountable to the respondents ".

Their Lordships consider therefore that there was and is no necessity to order a trial de novo before another Judge.

Once this conclusion is reached the remaining question becomes one of deciding as to the fairest way of reaching finality. The attitude of the defendant has been that he can readily show that all the money which he drew out of the account was in fact correctly applied. If the money was correctly applied then the items in List B become in no different category from those in List A as to which no claim was made by the plaintiff. It was stated in evidence that there was no record in the minutes of any authorisations for the drawing of the cheques. It was contended that the defendant was liable for any items of expenditure not covered by instructions recorded in the minute book and it was stated in evidence that the bank statement showed that some cheques which had been drawn had not been drawn in connection with the Kisan Sangh Building. It was however shown that cheques in List A had not been authorised by specific instructions recorded in the minute book and it was not asserted by the plaintiff that those cheques were not properly drawn. All this merely points to the eminent necessity and desirability of verifying that the items which were expended and which are included in List B were in fact expended for the purposes to which by common assent they were to be applied. The defendant asserts that they were. He proclaimed a willingness to account for every penny and indicated that he could show exactly what the money was used for. Their Lordships consider that it is a matter for regret that protracted legal proceedings should have taken place, and that there should for so long a time have been a parrying of requests to account for the due expenditure of the money in the Fund. Agreeing as their Lordships do with the findings of the learned trial Judge that the sums which are in question belonged to the plaintiff Association and that the defendant was accountable not to the donors of the money, as the defendant asserts, but to the plaintiff Association, as they the plaintiff Association assert, their Lordships are in agreement with the course which commended itself to Trainor J. A. Their Lordships will therefore humbly advise Her Majesty that the appeal of the defendant from the order of the Court of Appeal of the 14th June 1962 be dismissed and that the plaintiff's cross-appeal be allowed and that the order of the Court of Appeal of the 14th June 1962 be set aside and that the judgment of Knox-Mawer J. of the 1st September 1961 should be upheld save that portion which ordered the defendant to account to a Special Referee and ordered the defendant to pay all costs of the litigation incurred by the plaintiff to the date of that order and that the action be remitted to Knox-Mawer J. (1) to hear such evidence as the defendant may adduce in respect of the items in List B which remain in dispute with permission to the plaintiff to cross-examine or to call rebutting evidence and (2) to order judgment in accordance with his findings. The defendant must pay the plaintiff his costs of the second hearing before Knox-Mawer J. and his costs of the second hearing in the Court of Appeal. The costs of the first hearing before Knox-Mawer J. and of the first hearing in the Court of Appeal, not being before their Lordships will be disposed of by the learned Judge in the final order which he makes. Their Lordships direct that the costs of the further hearing before Knox-Mawer J. are to be in the discretion of the learned Judge. There will be no order as to the costs of this appeal.

(89150) Wt.8052/97 75 2.64 Hw.

In the Privy Council

NATHANIEL STUART CHALMERS

v.

THE FIJI KISAN SANGH

DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1964