22/79

No. 9 of 1976

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FIJI COURT OF APPEAL

BETWEEN:

(1) RAM NARAYAN (Son of Shankar) of Maro, Nadroga, Cultivator and
(2) VIJAY KUMAR (Son of Ram Narayan) of Maro, Nadroga, Cultivator (Defendants)

Appellants

- and -

RISHAD HUSSAIN SHAH (Son of Tasaduq Hussain Shah) of Maro, Nadroga, Driver (Plaintiff)

Respondent

(and Cross-Appeal)

CASE FOR THE APPELLANTS

1. This is an appeal from a judgment dated 26th November 1975 of the Fiji Court of Appeal (Gould VP, Marshack J.A. and Spring J.A.) allowing the Appellants' appeal from an Order of the Supreme Court of Fiji dated 9th June 1975 for specific performance of an alleged contract for the sale of two Farms by them to the Respondent but awarding the Respondent damages for breach of contract. RECORD p.50 p.29

2. The issue on this appeal is whether of not the Respondent established an enforceable contract. The Appellants' case is that there was no contract in writing and no sufficient memorandum of any oral contract to satisfy the Statute in that behalf.

RECORD

p.20 ll.15-17 and p.35 ll.5-10

3. The Appellants each held a farm in Maro, Nadrogar under lease from the Colonial Sugar Refining Company Ltd. (the Landlord Company) namely Farm No. 5128 of approximately 18 acres held by Ram Narayan and Farm No. 11242 of approximately 12 acres held by Vijay Kumar.

p.10 ll. 19 and 20

4. Each Farm was covered by a sugar cane contract with South Pacific Sugar Mills Ltd. (the Milling Company) which is a subsidiary company of the Landlord Company.

5. On 31st January 1968 the Respondent paid the Appellants £1,000 and the Appellants signed a receipt (the Receipt) Exhibit P.1 in the following terms:-

p.54

"Received from /the Respondent/ £1,000 being the deposit in respect of two farms at Maro Nadroga Nos. being 5128 and 11242 together with all improvements situate thereon. The balance being £4,000. Dated at Nadroga this 31st day of January 1968."

p.8 ll. 4-10

6. According to the Respondent's evidence at the trial the improvements referred to in the Receipt were a house, a tractor, two bullocks and a plough or two ploughs.

p.17 ll.23-27

7. The evidence on behalf of the Appellants at the trial was that the arrangement between the parties included the house a pair of bullocks and two ploughs but not a tractor.

8. No formal agreement for sale was entered into between the parties.

p.13 l 12 and p.15 ll 17-19

9. Early in 1968 the Respondent gave notice to quit to the occupier of the Farms Ram Narayan's brother-in-law.

p.56

10. On 19th April 1968 the Milling Company wrote to the Appellants' Solicitors the letter Exhibit D1 stating its readiness to consent to the transfer of the Farms. For the purposes of this appeal the Appellants accept that this letter was written with the authority of the Landlord Company and represented its views.

p.14 ll 16-18

11. In 1970 the Appellants said that they would not sell the Farms to the Respondent. The Respondent then complained to the District Officer.

RECORD

12. In 1974 the Appellants accepted Crown Leases of the respective Farms in the form comprised in Exhibits D2 and D3. The Appellants do not contend on this appeal that this affects the rights of the parties. p.57-68

13. On 26th September 1973 the Respondent commenced this action against the Appellants claiming specific performance and other relief. p.1
The Amended Statement of Claim alleges an agreement in writing dated 31st January 1968 for the sale of the Farms for £5,000, which is a reference to the Receipt. It further alleges an oral agreement as to payment of the balance of the purchase price upon the Appellants vesting the Farms in the Respondent and assigning the benefit of the said sugar cane contracts to him. It further alleges an implied term to give vacant possession to the Respondent on payment of the said deposit and to vest the Farms in the Respondent and to assign the said cane contracts to him. p.3

14. By the Amended Defence the Appellants (inter alia) denied the said allegation and denied that there was ever a binding agreement between the parties and in the alternative relied on the absence of a sufficient note or memorandum of an agreement for the purposes of the Statute namely section 59 of the Indemnity Guarantee and Bailment Ordinance (Cap 208) which is in the following terms:- p. 5,6

"59. No action shall be brought....
(d) upon any contract for the sale of lands tenements or hereditaments or any interest in or concerning them;
unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

15. The action was tried by J.T. Williams J. who by Order dated 9th June 1975 ordered specific performance of "the agreement dated the 31st day of January 1968 in the pleadings mentioned" and ordered the Appellants to pay to the Respondent the sum of £2,635 by way of damages and ordered the Appellants to pay the Respondent's costs of the action. p.29

RECORD

pp 20-29 p.20 and p.21 ll 1-12 p.21 l 12- p.25 l 26 p.25 l 27 - p.28 l 5 p.28 ll 6-30 p.28 and l 31 - p.29 l 3

16. In his Judgment Williams J. summarising the issues considered and dismissed the contention that the Receipt was not a sufficient memorandum to satisfy the Statute. The learned Judge then considered when the contract ought to have been completed and held that, as the Appellants had not served the Respondent with any notice giving him a reasonable time within which to complete, their purported termination of the contract in 1970 was arbitary and unjustified. The learned Judge considered the contention relating to Crown Leases mentioned in paragraph 12 above. Finally the learned Judge dealt with the question of damages. Observing that the Respondents' Counsel submitted that damages should be assessed from the date of the Writ until the date of the Writ until the date of judgment, he assessed these at £2.635.

p.34

17. The Appellants' Appeal to the Fiji Court of Appeal was heard on 10th November 1975 by Gould V.C. Marsack J.A. and Spring J.A. The principal judgments with which Spring J.A. agreed were delivered by Marsack J.A. and Gould V.C.

pp 34-44 p.34 l 31 to p.37 l 23

18. In his Judgment Marsack J.A. after setting out the facts and summarising the issues raised on the appeal dealt with the following points

(1) In relation to the contention that the Receipt did not constitute a sufficient memorandum to satisfy the Statute, which he rejected. the Learned Judge of Appeal considered

p.37 l 44 to p.37 l 2 — (a) the absence of any reference in the Receipt to a date for possession

p.39 ll 3-41 — (b) the contention that it failed to set out the whole of the bargain in that it made no mention of the chattels

p.39 l 42 to p.41 l 5 — (c) the contention that it failed to set out the whole of the bargain in that it made no mention of the assignment of the cane contract;

(2) The Learned Judge of Appeal considered

p.41 ll 6-42 the submission that the Receipt was a receipt and

RECORD

nothing more than a receipt, and held that it could nevertheless constitute a memorandum for the purposes of the Statute.

(3) The Learned Judge of Appeal rejected a contention that the transaction was unlawful in that the aggregation of cane farms in one person was forbidden; p.41 l 43 to p. 42 l 18

(4) Finally he accepted the contention that the Respondent's laches was a good defence to an order for specific performance. p 42 l 32 to p. 44 l 10

19. In his Judgment Gould VP considered and rejected a further ground on which it had been contended that the Receipt was not a sufficient memorandum namely pp 44-49

(d) the absence of any provision as to place of payment of the purchase money. p.45 ll 6-41

Gould VP then considered and reached the same conclusion as Marsack J.A. on the arguments referred to in the foregoing paragraph at (1)(a) (b) and (c). p.45 l 2 to p.49 l 7

Finally, the learned Vice President agreed that the Respondent was not entitled to a decree of specific performance by reason of his own delay. p.49 ll 8-11

20. The Fiji Court of Appeal accordingly allowed the Appellants' appeal against the order for specific performance but remitted the case to the Supreme Court to assess the damages properly payable to the Respondent for breach of contract. It was further ordered that each party pay his own costs of the appeal. p.50,51

21. The contentions which the Appellants will pursue on the present appeal are those referred to in parargraph 19 above at 1(b) and (2). The Appellants submit that the Receipt was not itself a contract for sale. The Agreement if any must have been an oral agreement. It is respectfully submitted that as a memorandum for the purpose of the Statute the Receipt is deficient for two reasons: first, it does not recognise that a contract has in fact been entered into; secondly, it does not refer to items which were comprised in the sale and the consideration for which was included in

the purchase price mentioned in the Receipt, namely two bullocks and two ploughs.

22. The Appellants therefore submit that there is no enforceable contract. If there is an enforceable contract, they will contend on the cross-appeal that the Fiji Court of Appeal was right in refusing the remedy of specific performance on the grounds of the Respondent's laches.

p.51 23. On the 10th December 1975 the Fiji Court of Appeal granted the Appellants and the Respondent leave to appeal and cross-appeal respectively to Her Majesty in Counsel.

24. The Appellants respectively submit that the judgment of the Fiji Court of Appeal was wrong in holding that there was an enforceable contract and that the order for damages for breach of contract ought to be reversed and that this appeal ought to be allowed with costs for the following (amounst others)

R E A S O N S

1. BECAUSE the Respondent has not established an enforceable contract.

2. BECAUSE the Receipt was not a contract in writing.

3. BECAUSE the Receipt was not a sufficient memorandum for the purposes of section 59 of The Indemnity Guarantee and Bailment Ordnance Cap 208 in that it did not recognise that a contract had in fact been entered into.

4. BECAUSE the Receipt was not a sufficient memorandum for the purposes aforesaid in that it did not refer to all the material terms of the sale namely in particular the inclusion therein of certain chattels.

JOHN JOPLING

Settled

Lincoln's Inn
21 February, 1978.

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- and -

RISHARD HUSSAIN SHAH
Respondent

CASE FOR THE APPELLANTS

CHARLES RUSSELL & CO.,
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