

38,1954

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In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL SUPREME COURT OF THE
FEDERATION OF MALAYA.

UNIVERSITY OF LONDON
W.C. 1.
23 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

THE FIRM OF T.A.R.C.T. (Plaintiffs) *Appellants*

AND

THE FIRM OF SV. KR alias SEENA VANA KANA
RUNA (Defendants) *Respondents.*

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38057

Case for the Appellants.

RECORD.

1. This is an appeal by leave of the Court of Appeal at Penang of
The Supreme Court of Malaya from a Judgment and Order of the said
Court of Appeal dated the 16th August, 1952, in Civil Appeal No. 60
of 1951. p. 60.
p. 59.

2. By the said Judgment the Court of Appeal held by a majority,
that the Respondents had validly discharged a loan of money lent to them
by the Appellants, by paying the said sum to one Annamalai Chettiar
as ostensible agent of the Appellants to receive such repayment. pp. 51-58.

20 3. The main question for determination upon this appeal is whether
the said Annamalai Chettiar had any ostensible authority to receive such
repayment of the said loan on the Appellants' behalf.

4. The facts leading to this Appeal are as follows :—

(1) Both the Appellants and the Respondents are chettiar or
money-lending firms.

(2) In 1941 the Appellants were carrying on at 140 Penang
Street, Penang, a business of making loans of money at interest,
often, but not by any means invariably, in collaboration with another
chettiar firm, known as O.R.M.SP.SV (hereinafter referred to as
O.R.M.). They were in the same premises : other chettiar firms
also occupied those premises. p. 30, ll. 5-9.
p. 30, l. 5.
p. 10, l. 34.

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p. 13, l. 5.
p. 30, l. 12.

(3) Each firm had a chest or deed-box but the Appellants had no clerk as O.R.M. provided the clerical staff required for the purposes of recording the Appellants' business as well as its own.

p. 7, l. 3.

(4) The Appellants' agent was one Arunasalam Chettiar (hereinafter referred to as Arunasalam) who held their power of attorney. The agent of O.R.M. was one Annamalai Chettiar (hereinafter referred to as Annamalai).

p. 7, l. 9.

(5) The said Arunasalam had under his control two distinct funds—

(A) General funds of the Appellants.

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p. 9, l. 45.

(B) Funds of what was known as the Appellants' Charitable Trust.

p. 18, l. 30.

He alone had authority to draw on the Appellants' Bank Account.

(6) The course of business of the Appellants and O.R.M. so far as relevant was as follows at all material times prior to 11th December, 1941, when Arunasalam was killed by a bomb :—

(A) With respect to the general funds of the Appellants—

p. 51, l. 16.
p. 53, l. 14.

The said Arunasalam acting on the Appellants' instructions would provide a proportion, usually one-third, of loans or investments effected by Annamalai on behalf of O.R.M. O.R.M. was accountable to the Appellants but the borrower would deal only with O.R.M. 20

p. 9, ll. 26-29.

(B) With respect to the Appellants' Charitable Trust Funds—

p. 10, l. 2.

These were available only for loan to other members of the chettiar community on Thavannai letters which, though such loans might be arranged by Annamalai were always in the name of the Appellants.

p. 19, l. 21.

p. 55, l. 43.

During the lifetime of Arunasalam no such loan was repaid to Annamalai. 30

(7) It is with a loan of the latter kind that the present appeal is concerned.

p. 25, l. 20.

(8) In September, 1941, the Respondents by their agent, one Sithambaram, approached Annamalai for a loan of \$5,000 on a Thavannai letter. Annamalai gave the said Sithambaram a cheque for this sum drawn in favour of the Respondents on the Appellants' account by Arunasalam. Annamalai also gave to the said Sithambaram two draft Thavannai letters to copy and sign. The first of the said letters, both of which were duly copied and signed by the said Sithambaram on behalf of the Respondents was for \$2,000 and was addressed to O.R.M. The second was for \$3,000 and was addressed to the Appellants. It is with this second letter that the present appeal is concerned. 40

p. 16, l. 4.

(9) The said letter was in the following terms :—

SV.KR.
Sungei Patani

Penang Impressed Stamp 31 cts.

T.AR.CT.

Penang.

31st day of the month of Avani,
visu year (16.9.41).

10 Sithambaram hereby writes : Received from you \$3,000/- p. 68.
on current date. We have credited this three thousand dollars
in the name of T.AR.CT. Charity Fund Trust through you from
current date at 5/16% interest, i.e. interest rate at 3/32% over
and above the rate of interest ruling for the Penang three
months "Thavannai" (account). We hereby agree to pay the
principal and interest to your order at Penang on due date and
get back this letter endorsed.

(Sgd.) SITHAMBARAM CHETTIAR,
Attorney of S.V.K.R.

20 (10) At the outbreak of War on 8th December, 1941, Annamalai p. 16, l. 27.
and Arunasalam went to live at The Waterfall Temple, Penang,
taking with them most of the account books and documents of their
respective firms.

(11) On 11th December, 1941, before any interest was payable
or had been paid under the said letter, the said Arunasalam was p. 7, l. 4.
killed in an air raid on Penang. In the same air raid 140 Penang p. 30, l. 23.
Street was destroyed.

(12) Annamalai took charge of the Appellants' documents p. 16, l. 48.
including the said letter, and conducted the business of both O.R.M. p. 23, l. 44.
and the Appellants until 1946, when he returned to India. p. 17, l. 27.

30 (13) On the 25th June, 1943, the Respondents paid to Annamalai p. 17, l. 10.
the principal and interest then due under the said letter, and received
back from Annamalai the said letter endorsed by him as follows :—

Dated the 11th day of Auni
Subanu year.

40 Excluding the interest received up till 30th day of Vaigasi, p. 68.
current year (14.6.43) per this letter, received through cheque
No. 53102 drawn on the Indian Overseas Bank for threethousand
dollars and cash two dollars and seventy-five cents, total \$3,002.75
in settlement of principal of \$3,000/- and 11 days' interest of
\$2.75 from the 31st day of the aforesaid month till 10th of current
month and this letter has been settled.

(Sgd.) ANNAMALAI CHETTIAR,
Agent of O.R.M.M.SP.SV.
for T.AR.CT. Kuppan Chettiar.
25.6.2603.

(14) The Appellants did not receive any part of the sum so paid.

p. 2.

5. The Appellants, by a specially indorsed writ dated 7th October, 1949, claimed the principal and interest due in respect of the said letter, amounting to \$3,809.45.

p. 4.

6. By their Defence, dated 5th December, 1949, the Respondents pleaded :—

(A) That they were not indebted to the Appellants in the sum claimed.

(B) That the loan of the said sum was made by Annamalai as agent for O.R.M. ; that they were given by him a cheque for \$5,000 from O.R.M. ; that they gave him two Thavannai letters, one in the name of the Appellants, in accordance with his instructions. 10

(C) That the principal and all the interest due on the said letters had been repaid to Annamalai, and that they had received back the said letters duly cancelled.

p. 5.

7. By their Reply, dated 11th April, 1950, the Appellants joined issue on the Defence and further contended :—

(A) That at the time the loan was made Arunasalam had sole authority to transact business on their behalf ;

(B) That Arunasalam was killed in December, 1941, and that thereafter there was no one in Malaya authorised to receive money or give valid receipts on their behalf. 20

(C) That Annamalai was at no time their agent authorised to receive money and give receipts on their behalf.

The Appellants claimed interest at $3\frac{3}{4}\%$ from 4th October, 1949, to Judgment.

8. The action was heard by the Hon. Mr. Justice Spenser Wilkinson on 20th August and 4th and 5th September, 1951.

9. At the trial it was contended—

(A) For the Respondents :—

p. 31, l. 42.

1. That the fact that the said loan had been originally transacted by Annamalai made it proper for the Respondents to repay it to him. 30

p. 31, l. 42.

2. That the Appellants had subsequently ratified the act of Annamalai.

p. 32, l. 12.

3. That Annamalai was the Appellants' agent of necessity.

p. 31, l. 44.

4. That Annamalai was the Appellants' ostensible agent.

p. 32, l. 6.

5. That Annamalai was the general agent of the Appellants to make loans and therefore had implied authority to accept repayment.

(B) For the Appellants :—

p. 8, l. 12.

1. That it was not open to the Respondents on their pleadings to contend that Annamalai was the Appellants' agent. 40

p. 33, l. 27.

2. That Annamalai had no authority or agency of any kind to deal with the Appellants' loans of the type referred to in sub-paragraph 5 (B) of paragraph 4 hereof.

3. That any alleged implication of authority in Annamalalai to receive repayment was negatived and destroyed by the terms of the relevant written document, viz., the said Thavannai letter addressed to the Appellants. p. 33, l. 34.

4. That there was no evidence of ratification or of holding out. p. 32, l. 37.
p. 33, l. 4.

5. That there was no evidence of necessity sufficient to create agency. p. 33, l. 36.

10 6. That the Respondents had not shown that they had repaid the money to anyone who had authority to receive it on the Appellants' behalf and that they were therefore still liable to repay it. p. 33, l. 39.

10. On the first day of the trial, the learned Judge ruled against the Appellants' first contention, having regard to the terms of the Reply. p. 8, l. 19.

11. By his reserved Judgment delivered on 9th October, 1951, the Hon. Mr. Justice Spenser Wilkinson held that :— p. 34.

20 1. It was clear on the face of the said letter and upon the proper construction thereof that it was the duty of the Respondents to repay the said money to the Appellants or to an agent of that firm with authority to receive it on their behalf. p. 35, ll. 2-6.

2. The Respondents' contention that a loan is always repayable to the actual person who lent it was consequently inadmissible and unacceptable in this case. p. 35, ll. 7-13.

3. The fact that the loan was actually transacted by a particular person was one of the circumstances to be taken into account in considering the whole question of agency in any particular case. p. 35, ll. 18-27.

4. When both Arunasalam and Annamalalai were alive, they were both general agents of both firms, Annamalalai having a dominant voice in the management of both. p. 36, ll. 13-16.

30 5. Annamalalai decided questions of policy and Arunasalam carried out that policy by signing the necessary documents such as cheques or deeds : Annamalalai was a general agent of both firms. p. 36, ll. 22-26.

6. There was no evidence of ratification. p. 36, l. 30.

7. On the evidence as a whole, the Respondents made repayment to an ostensible agent of the Appellants. p. 36, ll. 41, 42.

12. Judgment was accordingly entered for the Respondents with costs. p. 37.

40 13. The Appellants duly appealed from the said Judgment to the Court of Appeal of Penang, on the grounds that the learned trial Judge was wrong in holding as set out in paragraph 11 (4) (5) and (7) hereof, and on the further grounds that—

(A) Even if Annamalalai was the general agent of the Appellants, this was insufficient to support a finding that the payment made to him by the Respondents and his endorsement on the said letter were a good discharge of the Respondents' debt owed to the Appellants. p. 39, l. 31.

p. 40, l. 1.

(B) It would have been necessary for the learned trial Judge to find that the said Annamalai was the Appellants' general agent with authority to receive moneys owed to the Appellants, to issue receipts and to endorse Thavannai letters.

p. 40, l. 8.

(c) The learned trial Judge did not so find; there was no evidence on which he could have so found; it had not been pleaded that Annamalai had such authority.

p. 59.

14. The said Appeal was heard on 22nd February, 1952. On 16th August, 1952, the Judgment of the Court of Appeal (Mathew, C.J., Federation of Malaya and Pretheroe, J.; Murray-Aynsley, C.J., Singapore 10 dissenting) was delivered, dismissing the said Appeal and holding:—

p. 52, l. 39.
p. 58, l. 40.

That the said Annamalai was the Appellants' ostensible agent to receive the said money.

[No member of the Court held that there was any actual agency or authority.]

Per Mathew, C.J. :

p. 52, ll. 33-39.

Because the Appellants and O.R.M. carried on business in the same room; because the Appellants had an interest in many of the loans made by O.R.M.; because the loan the subject of the present case was in fact arranged by Annamalai; because of the decisions 20 in *Barrett v. Deere, M. & M.* 200; *Wilmot v. Smith, M. & M.* 238.

p. 52, l. 19.
p. 52, l. 26.

Per Pretheroe, J. :

p. 58, ll. 25-36.

Because the Respondents' representative went to the room where both the Appellants and O.R.M. carried on their business; because the loan was there arranged by Annamalai, who also signed the said letter "Annamalai Chettiar, Agent of" O.R.M. "for" the Appellants; because before the Occupation the Respondents paid the interest as and when due to Annamalai; because after the Occupation and after the destruction of the business premises the Respondents sought out Annamalai and continued to pay him the interest; because in June, 1943, the Respondents repaid the capital to Annamalai; because though the Respondents knew the loan was from the Appellants every single transaction was conducted between themselves and Annamalai; because the Respondents clearly regarded Annamalai as the Appellants' agent. 30

Murray-Aynsley, C.J., dissented :

p. 55, ll. 38-44.

Because there was no evidence of actual agency or of holding out of Annamalai as the Appellants' agent; because loans of the Appellants' Charitable Funds were expressly made by the Appellants 40 and there was no evidence of any payments of such loans to the agent of O.R.M. in the lifetime of Arunasalam.

p. 60.

15. By an order of the said Court of Appeal, the Appellants were on 17th April, 1953, granted Final Leave to appeal to Her Majesty in Council from the said Judgment of the said Court of Appeal.

16. It is submitted on behalf of the Appellants that their Appeal should be allowed with costs for the following among other

REASONS

- (1) BECAUSE the said judgment of the Court of Appeal is erroneous in law, in that the majority of the Court did not apparently appreciate that the concept of Ostensible Agency requires some act of holding out of the alleged ostensible agent by the alleged principal.
- 10 (2) BECAUSE the authorities relied upon by the majority of the Court do not support the view adopted by the said majority, which is inconsistent with the decisions in *Bocking Garage v. Mazurk* ("Times" Newspaper 4th Feb., 1954) and *Bailey & Whites, Ltd. v. House* (1915) 31 T.L.R. 583.
- (3) BECAUSE the decision of the Court cannot be supported in the absence of any evidence of any act of holding out of the said Annamalai by the Appellants to the Respondents as a person with authority to receive the said money on their behalf.
- 20 (4) BECAUSE there was no evidence of any such holding out and the learned trial Judge did not find there was any such evidence.
- (5) BECAUSE the facts or supposed facts relied on by the majority of the Court are incapable in law of supporting the decision of the Court.
- (6) BECAUSE the facts or supposed facts relied on by Pretheroe, J., are logically incapable of supporting his decision.
- 30 (7) BECAUSE the Judgment of Pretheroe, J., proceeded in whole or in part upon two errors of fact, viz. :—
- (A) that Annamalai at any time signed the said letter otherwise than by endorsement on repayment ;
- (B) that the Respondents had paid interest to Annamalai before the Occupation (and consequently in the life-time of Arunasalam)
- and to the extent that it is founded on these errors is vitiated and of no effect or validity.
- (8) BECAUSE the dissenting Judgment of Murray-Ayusley, C.J., was correct.
- 40 (9) BECAUSE the Judgment of the said Court of Appeal is wrong and ought to be reversed.

KENNETH DIPLOCK.

RODGER WINN.

In the Privy Council.

ON APPEAL

*from the Court of Appeal Supreme Court
of the Federation of Malaya.*

BETWEEN

THE FIRM OF T.A.R.C.T

(Plaintiffs) *Appellants*

AND

**THE FIRM OF SV. KR alias
SEENA VANA KANA RUNA**

(Defendants) *Respondents.*

Case for the Appellants

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