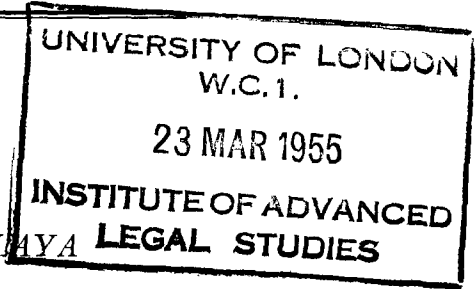


In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL

SUPREME COURT OF THE FEDERATION OF MALAYA



38058

BETWEEN: THE FIRM OF T.A.R.C.T (Plaintiffs)

Appellants

AND

THE FIRM OF SV. KR. alias SEENA VANA

KANA RUNA (Defendants) -

- Respondents

RECORD.

10

Case of the Respondents

1. This is an Appeal by leave of the Court of Appeal of the Supreme Court of The Federation of Malaya dated the 17th April 1953 from the Judgment of that Court dated the 16th August 1952 dismissing with costs the Appellants' Appeal from the Judgment of the High Court at Penang dated the 9th October 1951 whereby their claim against the Defendants, the Respondents herein, was dismissed with costs.

p. 60
p. 59
p. 37

2. The decision of the Court of Appeal of the Supreme Court of The Federation of Malaya was a majority decision, the Chief Justice of The Federation of Malaya (Mr. Justice Charles Mathew) and Mr. Justice Pretheroe delivering Judgments in favour of dismissing the Appellants' Appeal and the Chief Justice of Singapore (Sir Charles Murray-Aynsley) delivering a dissenting Judgment. The original Judgment appealed from was that of Mr. Justice Spenser Wilkinson.

pp. 51-52
and
pp. 56-58
pp. 53-56
pp. 34-36

3. The Appellants' claim, which is the subject-matter of this Appeal, was for \$3,000 and interest on a Thavanai letter for that amount dated the 16th September 1941. A translation of the letter is contained in the Record. The Judgments in the Respondents' favour were to the effect that the principal sum

pp. 1-2
p. 68

RECORD.

and interest were duly paid to a person held in the circumstances to be the Appellants' agent, namely one Annamalai Chettiar (hereinafter called "Annamalai").

4. The question for decision in this Appeal is whether the Judgments which held that the said Annamalai was the Appellants' agent in receiving payment from the Defendants should be upheld or not.

pp. 1-3
p. 4
5. The Appellants' claim was made by Specially Indorsed Writ of Summons dated the 7th October 1949, claiming the said principal sum and interest, an amount in all of \$3,809.45. The Respondents delivered a Defence dated the 5th December 1949 denying indebtedness and alleging 10

(i) that the said Annamalai, there described as the agent of the firm of O.R.M.SP.SV. (which firm is hereinafter called O.RM) arranged a total loan for them of \$5,000 on the 16th September 1951 at Penang on two thavanai letters, one being for \$3,000 in the name of the Appellants and

p. 5
(ii) that they duly paid to Annamalai all interest in respect of the total loan and that on the 25th June 1943 they paid to him the principal and interest and received back the thavanai letters duly cancelled To such Defence the Appellants delivered a Reply dated the 11th April 1950 joining issue with the Respondents and alleging (i) that their agent at Penang on the 16th September 1941 was one Arunasalam Chettiar (hereinafter called "Arunasalam"), (ii) that their said agent Arunasalam was killed in an air raid on Penang in December 1941 and (iii) that Annamalai was at no time their agent authorised to receive and give receipts on their behalf. 20

p. 6, l. 40 to
p. 14, l. 9
p. 14, l. 17 to
p. 25, l. 8
p. 25, l. 9 to
p. 28, l. 26
p. 28, l. 26 to
p. 29, l. 43
6. The trial before Mr. Justice Spenser Wilkinson took place on the 20th August and 4th and 5th September 1951 and the Appellants called one witness only, namely their then agent, K.M.A.R.K.M. Kumarappa Chettiar (hereinafter called "Kumarappa"). The Respondents called a number of witnesses and in particular (i) the said Annamalai, who deposed to the original loan and to receiving re-payment and (ii) Sithambaram Chettiar (Sithambaram) and (iii) Muthupalaniappi Chettiar (Muthupalaniappi), who deposed respectively to receipt and repayment of the loan and interest. 30

7. The following formed important parts of the evidence given before the trial Judge: —

By the Appellant's witness—Kumarappa

p. 7, ll. 1, 2
(1) That the books of his firm showed that in 1941, \$3,000 was lent to the Respondents on a thavanai letter.

p. 7, ll. 3-5
(2) That at that time the Appellants' agent was Arunasalam and that he was killed by bombing in December 1941.

(3) That no other agent was appointed for the period of the Japanese Occupation. p. 7, l. 6

(4) That it appeared that the books and documents of the Appellants were taken into custody by the agent of O.R.M, namely Annamalai, and that his entries purported to show repayment of the sum lent. p. 7, ll. 7-15

(5) In cross-examination—that there was a certain business connection in Penang between the Appellants and the firm of O.R.M. Details were put in the cross-examination and dealt with by the witness. p. 7, l. 32 to p. 12, l. 42

By the Respondent's witnesses

10 (1) By Annamalai—

That the Appellants and O.R.M. did business in partnership. p. 14, ll. 26-29

That Arunasalam was agent of the Appellants, having previously been an assistant in O.R.M, and that Arunasalam acted as directed by the representative of O.R.M. p. 15, ll. 6-7
p. 15, ll. 8, 9

That he (Annamalai) was the agent of O.R.M, and that in September 1941 he arranged the loan of \$5,000 for the Respondents, \$3,000 in the name of the Appellants, in exchange for thavanai letters. p. 15, ll. 38-39
p. 15, l. 42 to p. 16, l. 21

20 That when the War started in December 1941 he and Arunasalam went and stayed together in a certain Temple outside the Town, taking with them some account books and other documents. p. 16, ll. 27-30

That after the death of Aranasalam in the bombing in December 1941 he (Annamalai) carried on the business of O.R.M and of the Appellants. p. 16, ll. 48-49

That the loan of \$5,000 was repaid with interest during the Japanese Occupation and all by June 1943. p. 17, ll. 10, 11

(2) By Sithambaram—
that he negotiated the loan with Annamalai. p. 25, ll. 20-30

(3) By Muthupalanippi—
That he paid interest on the loan to Annamalai once before the War in December 1941 and also during the Japanese Occupation: and that he paid back the loan to Annamalai in September 1943 and received back the thavanai letter. p. 28, ll. 43-45
p. 29, ll. 1, 2
30

(4) By Ramasamy Chettiar (Ramasamy)— pp. 30, 31
that O.R.M and the Appellants carried on business in the same premises in Penang and carried on business jointly.

8. In his Judgment the learned Trial Judge, Mr. Justice Spenser Wilkinson, summarised the issue between the parties as follows:— pp. 34-36

p. 34, ll. 26-32

“On the 25th June 1943 the Defendants paid to Annamalai Chettiar the principal and interest then due in respect of the loan of \$3,000 and received back the appropriate Thavannai letter cancelled by Annamalai Chettiar, purporting to act on behalf of the firm of T.A.R.C.T. The Plaintiffs’ contention in this action is that the Defendants have not repaid the money to any person authorised to receive it, and they are, therefore, still liable to T.A.R.C.T for the money.”

p. 35, ll. 15-17

The learned Judge then referred to the Thavanni (or Thavanai) Letter and said “To my mind the money borrowed on this letter was clearly repayable to the firm of T.A.R.C.T or their agent and to no one else”.

p. 35, l. 45

p. 36, ll. 2, 3

p. 36, ll. 8-12

The learned Judge then turned to consider the question of agency and accepting the evidence of Ramasamy and stating that similar evidence was given by Annamalai said “I think this evidence of the close relationship between the two firms is borne out by the very large volume of business shown to have been done by the two firms jointly, most of the investments being in the name of O.R.M. Although they each had some separate transactions they were virtually joint firms”.

p. 36, ll. 13-29

The Judge then found and held that when the agents of both firms were alive both were general agents of both firms and that when Arunasalam was killed it was right for Annamalai to take charge of the books and business of the Appellants until he was in a position to receive further instructions from India, where the Plaintiffs were.

The Judgment concluded as follows:—

p. 36, ll. 41-43

“On the evidence as a whole I am satisfied that the Defendants made repayment of the loan to an ostensible agent of the Plaintiff firm, who held the document, and the Plaintiffs’ claim therefore fails”.

9. It is submitted that the question at issue was essentially one of fact and that there was ample evidence to justify the learned trial Judge’s findings in favour of the Respondents.

pp. 38-40

10. The Appellants appealed from the Judgment of Mr. Justice Spenser Wilkinson to the Court of Appeal and in a Memorandum of Appeal dated the 22nd November 1951 and a Statement of Further Grounds of Appeal (undated) gave a number of grounds for challenging the finding of agency made against them.

pp. 40-50

11. The appeal to the Court of Appeal was fully argued on both sides and reference was made to a number of text books and cases dealing with the question of agency.

pp. 51-52

12. In giving Judgment in favour of dismissing the Appeal the Chief Justice of the Federation of Malaya reviewed the facts, referred to a passage in *Chitty on Contracts* (20th Edition) p. 266/67 and to the cases of *Barrett v Deere Moo & M 200* and *Wilmott v Smith Moo. & M 238* cited in support thereof, and

said "There is no dispute in this case that the firms of O.R.M and T.AR.CT carried on business in the same room, that T.AR.CT had an interest in many of the loans made by O.R.M and that the loan of \$3,000 the subject of this case, was in fact arranged by Annamalai Chettiar. In my view, it would be impossible on the facts and having in mind that the loan emanated from the T.AR.CT Charitable Funds, to hold that Annamalai Chettiar was not the ostensible agent of the Plaintiffs-Appellants".

p. 52, ll. 33-39

13. Mr. Justice Protheroe in a Judgment agreeing with that of the Chief Justice of the Federation of Malaya referred to *Barrett v Deere* and added "In my view the facts of the present case are more compelling". He then summarised the facts and concluded "Thus the Defendants knew the loan was from the Plaintiffs but every single transaction was conducted between themselves and Annamalai. In the circumstances can it reasonably be suggested that they, the Defendants, did not regard Annamalai as the agent of the Plaintiffs?"

pp. 56-58

pp. 58, ll. 24, 25

pp. 58, ll. 34, 35, 36

14. In his dissenting Judgment the Chief Justice of Singapore reviewed the facts and said in respect of the Trial Judge's reasoning—"I am unable to follow this. I should not have thought that an order to follow the directions of the agent in making the loans would in any sense have made the other agent an agent of the T.AR.CT capable of binding that firm by his acts The matter is also unsatisfactory in view of the defence filed by the Defendants We have no evidence of actual authority of the O.R.M agent to receive money or give receipts. There is also no question of holding out . . . I cannot see anything in the relations of the two firms which would lead third parties to conclude that the O.R.M agent had any authority to receive money and give receipts on behalf of T.AR.CT. The whole evidence shows that this was the business of the T.AR.CT agent".

pp. 53-56

p. 55, l. 30 to

p. 56, l. 2

15. It is submitted that in reviewing all the circumstances the most notable fact is that everything in connection with the Appellant's side of the transaction was conducted by Annamalai: he arranged the loan, he received the thavanai letter, he received the payments of interest, he received the final payment and he then cancelled the thavanai letter. To the Respondents and to the world he had, it is submitted, the clear ostensible authority of the Appellants, who in this case were really at one and the same time approving or adopting his original actions in making the loan and yet disputing his authority to accept re-payment of it. Furthermore when the internal arrangements between O.R.M and the Plaintiffs were analysed it was shown that they were at all material times really carrying on business in Penang jointly so that Annamalai was acting in at least many respects with their express authority. Moreover, as the learned trial Judge said—"The cross-examination of the Defendants' witnesses by Counsel for the Plaintiffs confirmed the impression that the Plaintiffs' real complaint in this case is not directed so much to the fact that O.R.M collected the money as to the use to which that money was put after collection".

p. 35, ll. 34-38

16. It is submitted that when all the circumstances of the case are looked at Annamalai had either the real or ostensible authority of the Appellants to

complete the transaction he initiated, by accepting repayment of the loan he negotiated. There was no evidence that the Appellants had shown his authority to be limited in the respects they alleged.

17 The Respondents submit that this Appeal should be dismissed with costs for the following amongst other

REASONS

1. BECAUSE the issue was essentially one of fact and the findings of fact have been made in favour of the Respondents.
2. BECAUSE there was ample evidence to support the findings of the trial Judge and of the majority in the Court of Appeal. 10
3. BECAUSE in all the circumstances of the case Annamalai was either the actual or ostensible agent of the Appellants to receive payment from the Respondent.
4. BECAUSE the Judgments of the trial Judge, Mr. Justice Spenser Wilkinson, and of the majority in the Court of Appeal and the reasons given therefor are correct.

JAMES COMYN.

In the Privy Council.

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Case of the Respondents

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