9/1962

IN THE PRIVY COUNCIL No. 59 of 1960

ON APPEAL FROM

THE SUPREME COURT OF FEDERATION OF MALAYA

B E T W E E N

CHAI SAN YIN

(Defendant) Appellant

- and -

LIEW KWEE SAM

(Plaintiff) Respondent

CASE FOR THE RESPONDENT

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1. This is an appeal by leave from a Judgment of the Court of Appeal of the Federation of Malaya dated 20th June 1959 (Thomson, C.J., Syed Sheh Barakbah and Neal J.J.) dismissing an appeal by the Defendants against a judgment of the High Court at Seremban dated 27th November 1958, (Smith J.), in favour of the Respondent as Plaintiff in a claim for the sum of $5,097.42 being the balance of monies due and unpaid for smoked sheet rubber sold and delivered by the Respondent to the Appellant as one of four partners carrying on business as the Tong Seng Rubber Company at No.27 Jalan Tuan Sheikh, Seremban, in the State of Negri Sembilan; and for interest at 8% per annum from date of judgment to date of payment; and for costs. pp.25/35. pp.13/19. pp.1/3.

2. The Respondent brought his said claim in the High Court at Seremban by Civil Suit No.55 of 1951 against all four partners in the said firm, the Appellant being named as Second Defendant, the first Defendant being one Yap Seow Leong, the third Defendant being Eng Yong Ngi and Ang Yee Khoon respectively.

3. The first and third Defendants submitted to judgment for the amount claimed. The fourth Defendant being out of the jurisdiction was not served and the action was continued without him. pp.13/14.

4. The second Defendant (now and hereafter called "the Appellant") contested the Plaintiff's (now and hereafter called "the Respondent") claim on the ground: pp.4/5.

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(1) That he was not a partner of the Tong Seng Rubber Company at the material time.

(2) That the Respondent sold to the Appellant personally and not to the partnership.

(3) That in any event the partnership was illegal because it purported to be formed to carry on the business of rubber dealers on the licence of the first Defendant only and not on a licence issued to thepartnership.

(4) That any purported sale and delivery of rubber to the alleged partnership was illegal as being contrary to the Rubber Supervision Enactment, 1937, because it was an arrangement for the partnership to do business on a licence issued only to one member thereof.

5. The contest resolved itself ultimately into a dispute as to whether or not the Appellant was entitled to rely by way of defence upon the submission set out at (4) of paragraph 4 above, which issue was determined in favour of the Respondent.

pp.12 and 13.
p.15.

6. The facts leading to and upon which the said issue came to be tried are conveniently set out in the judgment of Smith J. and are as follows:

pp.14/15.

"The basic facts of the case are not in dispute. The first Defendant before the war was a rubber dealer in Seremban carrying on business under the style of Tong Seng Rubber Company. He started up his business again at the end of 1945 still under the style of Tong Seng Rubber Company and took out a rubber dealer's licence for himself alone trading as Tong Seng Rubber Company. On 14th January, 1946, he took in eight other partners. These partners were in accordance with the terms of the partnership agreement, sleeping partners. The sole management of the business was to be in the hands of the first Defendant and the rubber dealer's licence was to be in his name and his alone.

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Accordingly when it became necessary to apply for renewal of the rubber dealer's licence the First Defendant applied in his own name indicating that he was trading as the Tong Seng Rubber Company, but did not disclose the fact that he had eight sleeping partners. This state of affairs continued down to 1951. Throughout all this period the Plaintiff had been selling his rubber to the Tong Seng Rubber Company. The Plaintiff has said that he was aware that the first Defendant had a rubber dealer's licence but that he did not know and took no steps to ascertain whether any of his partners' names were included in the licence. He was aware that there were other partners since he says and the second Defendant does not deny, that the Plaintiff had met the second Defendant on the premises of the first Defendant, and that the second Defendant had said that he was a partner. The Plaintiff said he knew that the first Defendant was licensed and considered that the first Defendant represented all the partners. He also said, and it was not denied, that the second Defendant did not tell him that he was retiring from the partnership.

From time to time various members of the partnership withdrew therefrom and on 11th June, 1951 the second Defendant also withdrew. He did not give notice of his withdrawal to the Plaintiff. The last dealing of the Plaintiff with the Tong Seng Rubber Company was on 13th June, 1951 when he delivered some rubber and scrap.

On these facts there can be no doubt that the second Defendant would be liable, provided that the contract between the Plaintiff and the partners was legal. In so far as the last delivery of rubber is concerned, the second Defendant would still be liable because he had not given express notice of his retirement from the partnership to the Plaintiff."

7. In his judgment Smith J. held: pp.15-19.

(1) That the Tong Seng Rubber Company was not properly licensed as all its members should have been named in the licence.

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(2) That the contracts of sale of rubber entered into by the Respondent with the Appellant and his alleged partners and the sales of rubber effected by the Respondent were not illegal.

(3) That the Rubber Supervision Enactment No.10 of 1937 is a revenue enactment and not an enactment for the protection of the public and a breach thereon does not make such contracts and sales illegal and void.

(4) That even if such contracts and the sales of rubber were illegal, the Respondent was not a particeps criminis and could recover from the Appellant the price of such rubber sold.

(5) That the Respondent having dealt with a licensed rubber dealer, meaning Defendant No.1 in the original action, he the Respondent could recover from all the partners of such licensed dealer, though such other partners were not at any material time duly licensed under the Enactment.

(6) That the Respondent was under no obligation to inquire whether the partners of a rubber dealer's firm are or are not duly licensed under the Enactment so long as one of the partners holds a licence.

(7) That it is wrong on the part of the Appellant to set up his own illegal act as a reason for not returning or paying for the rubber sold by the Respondent.

(8) That even if the Respondent committed any offence under the Enactment he the Respondent was entitled to be put back in the position in which he was before by the Appellant paying the value of rubber sold.

pp.20-21. 8. The Appellant appealed to the Court of Appeal against all the findings of the learned trial judge save that numbered (1) in paragraph 7 above; but the Court of Appeal on 26th May 1959 and

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9th June 1959 delivered judgments upholding the findings of the learned trial judge save as to the said finding numbered (1) in respect of which it was held that the learned trial judge was wrong in holding that the Tong Seng Rubber Company was not properly licensed, Thomson, C.J. saying in the course of his judgment: pp.25-35. pp.30-31.

> "On the face of it the answer to the question 'Who purchased the rubber?' is 'Yap purchased the rubber'. And Yap was duly licensed. It is true that by reason of the partnership agreement what he did produced certain legal results as to the property in the rubber and the obligation to pay for it. Nevertheless I am not prepared to think that these results can be held to make illegal purchases which on the face of them were not prohibited by the statute. As has been said, the statute is completely silent on such questions as to how a purchaser of rubber obtains his capital. It is completely silent as to how he deals with the property to the rubber after he has purchased it except that, presumably, if he sells it to some other party who is not licensed he abets the commitments of an offence by that other party. In certain circumstances it may be that the expression "purchase" should be interpreted as connoting and including all the legal consequences which arise by reason of external circumstances from any individual purchase. Here, however, having regard to the object and contents of the statute it would in my view be wrong to put such a wide interpretation on the expression. It is clearly one object of the statute to ensure that dealings in rubber are conducted in such a way as to ensure publicity and thereby facilitate inspection by public officers. Another is to ensure that liability for compliance with these measures can be definitely and clearly fixed on the shoulders of a person licensed by the authorities, who has when necessary given security and whom the authorities are satisfied is a suitable person. If any person purchases rubber who has no licence then these objects are defeated. If, however, the actual purchaser is licensed it

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seems to me that the object of the statute is not defeated and that the purchase is not prohibited. On this view the fact that the purchaser is an agent or has entered into an agreement of partnership with other persons providing for the sharing with them of profits is wholly irrelevant.

That would be the end of the matter if it were not for the provisions of section 17 on which the main argument for the Appellant has been based.

That section has already been quoted and it is important to observe that it is the only section in the statute which makes any reference to persons carrying on business in partnership. Nowhere is it said that it is forbidden for persons carrying on business in partnership to deal in rubber. What it does say is that no person shall purchase rubber unless he is licensed. Clearly where two persons each purchase rubber each of them would have to be the holder of a licence and the consideration that they happen to be carrying on the business in partnership would be irrelevant and would not excuse either of them from the obligation to hold a licence. All that Section 17 does, to my mind, is to mitigate that and provide that where two persons are carrying on business in partnership one licence is sufficient and enables each of the partners named in it to purchase rubber. The only person who purchased rubber was Yap. If rubber had been purchased by any other partner then unless he held a licence of his own or was included in a joint licence issued under section 17 the transaction might well have been prohibited by law and is illegal. There was, however, no suggestion of any such transaction being either carried out or indeed contemplated."

pp.32-34. AND Neal J. saying in the course of his judgment:

"I agree that this appeal must be dismissed.

My reasons for so agreeing are that in my opinion the partnership in this case was not an unlawful partnership nor was the contract

an unlawful contract as pleaded nor in my opinion was either the partnership or the specific contract of such a nature that it would defeat the provisions of the Rubber Supervision Ordinance.

If one examines the provisions of the Rubber Supervision Enactment one finds in Section 5 (1), "no person shall purchase, treat, or store rubber or pack rubber for export unless he shall have been duly licensed in that behalf under this Enactment". Sub-section (2) of Section 5 provides, inter alia, that every licence shall be in the prescribed form, and it is to be noted, as Sir Roland Braddell pointed out during the hearing, that the prescribed form provides for the names of the partners being included in the licence where there is a partnership.

The next relevant provisions for consideration are the terms of Section 16(ii) and (iii) which provide that no licence shall be assignable and that a licence is personal. To halt at this stage it is obvious that since the singular always include the plural (see Item 61 Sec.2 (1) Acts Interpretation and General Clauses Enact.7 of 1948) and because of the prescribed form under Section 5 (ii), if nothing more was said in the Enactment the contention of the Appellant would be correct that a licence in respect of a partnership business must include the names of all the partners. It is also in my opinion important to note at this stage that, having regard to the provisions to which I have referred, no further or additional provision needed to be made to enable a partnership to be licensed under a licence covering the names of all of the partners. So it follows in my opinion that Section 17 (i) is completely unnecessary if it went no further than submitted on behalf of the Appellant and held by the learned Judge in the Court below.

Section 17 (i) reads:

'Two or more persons carrying on business in partnership shall not be obliged to obtain

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more than one licence appropriate to the circumstances in respect of which the licence is issued, and a licence to two or more persons shall not be determined by the death or retirement from business of any one or more of the partners'.

In addition to the fact that Section 17 (i) was unnecessary if it meant that all of the partners had to be named in the licence there is support, and I think strong support, for the view that I have taken in the wording of Section 17 (i) and in particular the following words, "appropriate to the circumstances in respect of which the licence is issued". These words must be given some meaning. In my opinion they can refer to only two things, (1) the terms of the partnership and (2) the type of licence, that is to say purchase, storage or packing etc.

Dealing with the second alternative first, having regard to the definition of the term "licence" the phraseology used elsewhere in the Enactment and the actual wording in Section 17 (i), I have reached the conclusion that the Legislature was referring not to the type of licence but to details of the partnership. I have read and considered at length the reasons given by the Trial Judge for holding that Section 17 does not enable one or more partners to hold licences in respect of a partnership business between the licensed partner or partners and sleeping partners. The learned Trial Judge has based his opinion on the reasoning that the contrary would enable a licensed partner to take in as a sleeping partner a person who has been refused a licence and this would be in breach of the intention of the Legislature. To my mind the learned Trial Judge has read more into the particular Section than he was justified on a reading of the whole of the Enactment in doing. There is nothing in the Enactment to support the suggestion that the Legislature intended to prohibit a man who was refused a licence from having anything to do with a licensed business. This is evident if you consider the wording of Section 18. If the intention

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of the Legislature had been as suggested by the learned Trial Judge, then that intention was negatived completely by the failure of the Legislature to in any way limit the word "agent"."

9. On 12th January, 1960, the Court of Appeal of the Federation of Malaya sitting at Kuala Lumpur granted final leave to the Appellant to appeal to Her Majesty the Yang di-Pertuan Agong and the Respondent respectfully contends that the appeal should be dismissed with costs for the following among other p.37.

R E A S O N S

1. That there was ample evidence before the Learned Trial Judge to justify the findings of fact to which he came.

2. That the said facts are correct.

3. That on such findings of fact the Learned Trial Judge was correct in all his findings of law save as to his finding that all the persons should have been named in the licence and that the partnership was therefore not properly licensed.

4. That save as to the latter finding the reasons given by the learned Trial Judge in his judgment (which reasons the Respondent now adopts) were correct.

5. That the decision of the Court of Appeal of the Federation of Malaya was correct and for the reasons stated in the Judgment of Thomson C.J. and Neal J. which the Respondent hereby adopts.

ALAN GARFITT