RAMPALA AND OTHERS
v.
MOOSAJEES LIMITED AND ANOTHER

COURT OF APPEAL
ATUKORALE, J. (P/CA) AND G. P. S. DE SILVA, J.
C.A. (S.C.) NO. 344/74(F)
D.C. COLOMBO NO. 76039/M
13, 14 JUNE 1983.

Contract — Agency — Liability of agent — Unjust enrichment — Absence of averment re unjust enrichment in plaint or issues or submissions — Goods sold and delivered — Prescription — Prescription Ordinance, S. 12 —

The plaintiff-respondent (Moosajees Ltd.) filed this action against Whittal Boustead Ltd. (1st defendant) and 2nd defendant (Rampala) and 3 to 8 respondents — 2 to 8 defendants being co-owners of Blackwater Estate — to recover money due on fertilizer supplied. The suit was on 2 causes of action, the first cause of action was a claim solely against the 1st defendant on the basis that the fertilizer was ordered by the 1st defendant Co. itself undertaking to pay. The second cause of action was on the footing that the 1st defendant acted as agent for 2 to 8 defendants.

The District Judge held that the 1st defendant had ceased to be the managing agents of the estate after 31.3.69 and not liable for orders after that date and in any event both causes of action were prescribed. However he proceeded to give judgment for plaintiff on the ground of unjust enrichment despite absence of pleadings or issue or submissions.

Held —

1. The District Judge was in grave error in the total absence of pleadings and issues and in view of the course of proceedings and the basis of the presentation of the cast at the trial, in making a finding in favour of the plaintiff on the ground of unjust enrichment at the stage of judgment.

2. The statement in P10 by the 1st defendant, namely "immediately we hear from them (2 to 8 defendants), we will let you know what arrangements have been made with regard to the repayment of the outstanding account" constitutes an acknowledgement of a debt from which a promise to pay the debt could reasonably be inferred.

From the evidence and the sequence of the letters, it could be said that Whittals Estates and Agencies Ltd. were agents of the proprietors of the estate and were duly authorised to make the acknowledgement of the debt within the meaning of

section 2 of the Prescription Ordinance and the acknowledgement in P10 was sufficient to take the case out of prescription.

Cases referred to :

1. *Peiris v. The Municipal Council,* Galle 65 NLR 555.

2. *Perera v. Wickremaratne* 43 NLR 141.

APPEAL from judgment of the District Judge of Colombo.

H. L. de Silva, S.A. with *Gomin Dayasiri* for 2 to 8 defendant-appellants.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *Lakshman Perera* for plaintiff-respondent.

K. N. Choksy, S.A. with *Lakshman de Alwis* for 1st defendant-respondent.

Cur. adv. vult

20 July 1983.
G. P. S. DE SILVA, J.

The plaintiff-respondent (Moosajees Ltd.) instituted this action on 22nd February, 1972 against Whittall Boustead Ltd., the 1st defendant-respondent, and the 2nd to the 8th defendants-appellants, the co-owners of an estate called Blackwater Estate, for the recovery of a sum of Rs. 135,178/21 on account of fertilizers sold and delivered to them during the period which ended 27th September, 1970. According to the statement of account marked 'A' filed with the plaint, a sum of Rs. 105,765/60 represented the value of the fertilizers and the balance sum of Rs. 29,712/61 represented interest which the plaintiff claimed had accrued from time to time.

The plaintiff's claim was based on two causes of action. The first cause of action was a claim for the said sum solely against the 1st defendant on the basis that the fertilizers were ordered by the 1st defendant and that the 1st defendant undertook to make payment for the goods. In other words, the 1st defendant

contracted personally and was personally liable. Paragraph 4 of the plaint, reads thus :—

> "Upto the 27th September, 1970, at the request of the 1st defendant and on the undertaking to pay the plaintiff the price or value together with interest at 12% per annum on money overdue for a period exceeding three months, the plaintiff sold and delivered to the 1st defendant goods (fertilizer, etc.) for which an aggregate sum of Rs. 135,478/21 is due and payable from the 1st defendant as shown in the statement of account marked 'A' filed herewith and pleaded as part and parcel of this plaint."

The second cause of action was an alternative to the first cause of action and the plaintiff averred that, at all material times, the 1st defendant acted as agent for and on behalf of the 2nd to the 8th defendants, and that the said contract for goods sold and delivered, has been made by the 1st defendant as an agent of the 2nd to the 8th defendants who were the principals. Accordingly, the 2nd to the 8th defendants were jointly and severally liable in the said sum of Rs. 135,478/21.

The position of the 2nd to the 8th defendants as set out in their answer was :—

(a) that the 1st defendant in entering into the contracts for the purchase of fertilizer, did not do so as agents of the 2nd to 8th defendants;

(b) that the 1st defendant only is liable on such contract to the plaintiff.

As regards the first cause of action set out in the plaint, the trial Judge held :—

> "On the evidence, there is not a slightest doubt that the 1st defendant acted as the agent of the proprietors of Blackwater Estate. . . . . ."

Since the contract which was made by the 1st defendant was made only in its capacity as the managing agents of the estate, the trial Judge held that the 1st defendant was not liable. The District Judge also held that since the 1st defendant had ceased to be the agent as from 1st April, 1969, it would not be liable for orders placed after that date and that orders made upto 31st March, 1969 amounted to Rs. 34,637/03. The trial Judge further held that even this claim was prescribed and that the documents P8, P10 and P18 pleaded in paragraph 5 of the plaint, did not have the effect of taking the case out of prescription.

In regard to the second cause of action which was against the 2nd to the 8th defendants, the trial Judge held that these defendants were liable as principals in respect of all orders placed on their behalf by the first defendant as well as by the succeeding agents, namely, Whittalls Estates and Agents Ltd. The trial Judge, however, held that the claim based on the alternative cause of action was prescribed in law and that neither P10 nor P18 constitutes a promise to pay the debt so as to take the case out of prescription.

The District Judge having thus dismissed the claims based on both the first cause of action and the alternative cause of action, proceeded to hold that the 2nd to the 8th defendants were liable to the plaintiff on the ground of **unjust enrichment** in a sum of Rs. 105,765/60. The 2nd to the 8th defendants have now appealed against the judgment entered against them on that basis.

Mr. de Silva, Counsel for the 2nd to the 8th defendants-appellants, strongly urged that the District Judge was in grave error in entering judgment for the plaintiff on the basis of unjust enrichment. With this submission I agree. It is important to note that :—

(a) nowhere in the plaint was there a single averment on such basis;

(b) neither at the commencement of the trial nor during the course of the trial, did Counsel for the plaintiff even attempt to raise an issue on the ground of unjust enrichment; even if it was sought to raise such issue on the first date of trial, the cause of action on that basis would by then have been prescribed;

(c) even at the stage of written submissions which were made after the evidence was concluded, the plaintiff did not suggest a claim founded on the plea of unjust enrichment;

(d) Explanation 2 to section 150 of the Civil Procedure Code, does not permit a party "to make at the trial, a case materially different from that which he has placed on record and which his opponent is prepared to meet".

Mr. Jayawardene, Counsel for the plaintiff-respondent, relied on the case of *Peiris v. the Municipal Council of Galle* (1) and contended that the trial Judge was justified in giving judgment for the plaintiff on the basis of unjust enrichment. This was a case where the Municipal Council of Galle had employed a firm of architects to construct a Town Hall. The Municipal Council had paid only a part of the money due to the firm of architects for work done and the Council was sued for the balance amount. The District Judge held that the architects had performed their part of the contract but dismissed the action on the ground that the contract was void as it was not under seal. Thambiah, J., however, in appeal, held that the trial Judge should have framed an issue of "unjust enrichment" and should have tried it. The case was remitted to the District Court for that issue to be tried. For the purposes of the appeal before us, however, what is relevant is that Thambiah, J. took the view that "the plaint has been drafted in such a manner that all the averments necessary to raise the issue of undue enrichment are contained therein" (65 N.L.R. at 556). This case, therefore, could be distinguished from the appeal before us.

I accordingly hold that having regard to the total absence of pleadings and issues, the course of the proceedings and the basis of the presentation of the case at the trial, it was not open to the District Judge at the stage of judgment, to find in favour of the plaintiff on the ground of unjust enrichment.

Mr. Jayewardene, however, submitted that the District Judge has wrongly answered the issues relating to prescription and that the plaintiff was entitled to judgment in its favour. Mr. de Silva did not canvass the finding of the District Judge that the plaintiff sold and delivered fertilizers to the 2nd to the 8th defendants. (Issues 3 and 4) Mr. Jayewardene conceded that the claim of the plaintiff would be prescribed but for the acknowledgment of the amounts due to the plaintiff contained in the letters marked P8, P10 and P18. Therefore, the matter that arises for decision is narrowed down to the question, whether P8, P10 and P18 constitute an "acknowledgment" within the meaning of section 12 of the Prescription Ordinance so as to take the case out of prescription.

P8 is a letter addressed to the plaintiff by Whittalls Estates and Agencies Ltd. It is to be noted that this letter is dated 18/7/69. The period of prescription in respect of goods sold and delivered is one year but the action having been instituted only in February 1972, P8 is of no avail to the plaintiff. P18 is also a letter addressed to the plaintiff by Whittalls Estates and Agencies Ltd. and is dated 25/5/71. However, Whittalls Estates and Agencies Ltd. were the managing agents of Blackwater Estate only till 30/4/71. Therefore, P18, too, does not assist the plaintiff.

There remains for consideration P10. This is a letter dated 23/3/71, written by Whittalls Estates and Agencies Ltd. to the plaintiff. It reads thus:—

"BLACKWATER ESTATES

We are in receipt of your letter of the 12th instant, with enclosure, for which we thank you.

> The delay in effecting payment for manure supplied by you to the above estate is regretted, and we have already taken this matter up with the proprietors of the estate. Immediately we hear from them we will let you know what arrangements have been made with regard to the repayment of the outstanding account. We would mention that our Chairman did not categorically state that the sum due to you on account of manure supplied to the above estate will be paid, but he only stated that you will be informed of the position on our hearing from the proprietors.
>
> Yours faithfully,
> Per pro WHITTALLS ESTATES &
> AGENCIES LTD. "

P10 is the reply to P9 which is a letter addressed by the plaintiff to the 1st defendant, requesting payment for fertilizer supplied to Blackwater Estate owned by the 2nd to 8th defendants. In my view, the words, "Immediately we hear from them, we will let you know what arrangements have been made with regard to the repayment of the outstanding account" in P10, constitute an acknowledgment of a debt from which a promise to pay the debt could reasonably be inferred — Indeed, Mr. de Silva did not contend to the contrary. As observed by Soertsz, J. in *Perera v. Wickremeratne,*(2):—

> "It has frequently been laid down that when there is an acknowledgment of a debt without any words to prevent the possibility of an implication of a promise to pay it, a promise to pay is inferred."

Mr. de Silva, however, strenuously contended that P10 has not been signed by Whittalls Estates and Agencies Ltd. as agent of the owners of the estate and that Whittalls Estates and Agencies Ltd. have not been "duly authorized to enter into such contract" on behalf of the proprietors within the meaning of section 12 of the Prescription Ordinance. Mr. de Silva submitted

that the words "duly authorised" in section 12 of the Prescription Ordinance, mean specifically authorised to acknowledge the debt. A general authorization would not suffice, was Counsel's contention.

To consider these submissions, it is necessary to refer to the evidence. P3 is an order dated 21/4/69, addressed to the plaintiff by Whittalls Estates and Agencies Ltd. **for and on behalf of the proprietors of Blackwater Estate.** It was agreed at the trial, that all orders placed after 1/4/69 when Whittalls Estates and Agencies Ltd. took over the management of the estate, were similar to P3. Coomaraswamy who was Chairman of the 1st defendant-company as well as Whittalls Estates and Agencies Ltd., stated in evidence :—

(a) that Whittall Boustead Ltd. (1st defendant) ceased to be estate agents as from 31.3.69 and that the estate agency functions were taken over by Whittalls Estates and Agencies Ltd., as from 1/4/69 and continued to represent the estates which were previously managed by the 1st defendant; that when the transfer took place, the estates were informed of the change and there was also a press notification;

(b) that he discussed with the 2nd defendant (Rampala) and the 4th defendant (Dharmasena), the question of the payment of moneys due to the plaintiff on account of fertilizer supplied to Blackwater Estate;

(c) that the 2nd and 4th defendants told him that they would make arrangements to obtain the money;

(d) that by P15, a letter dated 30/12/70, Whittalls Estates and Agencies Ltd., had informed the plaintiff that :—

> "we are arranging a conference with the proprietors of this estate (Blackwater) and look forward to being able to write to you after we have ascertained their wishes in regard to the future of this property.".

Apart from the oral evidence of Coomaraswamy, P10 has to be considered in the context of the other documentary evidence, in particular $1D_{11}$ and $1D_{12}$. $1D_{11}$ is a letter dated 26/2/71, written by Whittalls Estates and Agencies Ltd., to the 4th defendant who according to the evidence, "was the person handling matters on behalf of the estate". $1D_{11}$ reads thus :—

"BLACKWATER ESTATE

We refer to the discussions we had with you and Mr. Rampala, in this office on the 9th of January this year. You then agreed to discuss the question of Blackwater finances with your Co-owners and advise us thereafter of the proposals you have in mind.

We trust that you have now discussed this matter with your Partners, and await your early reply.

Yours faithfully,
WHITTALLS ESTATES & AGENCIES LTD. "

$1D_{12}$ is a letter dated 1/3/71, written by the 4th defendant to Whittalls Estates and Agencies Ltd. It reads as follows:—

" BLACKWATER ESTATE

I am in receipt of your letter dated 26th February, 1971 for which I thank you.

The question of Blackwater finances was discussed, as per your suggestion with the Co-owners of the estate. They are of opinion that in view of the present critical situation of the country and that they are also financially in great difficulty, it is impossible to finance the estate for future management.

In these circumstances, they have decided to sell the estate and settle the debts.

In this connection, I have already made some arrangements and if it is successful I will let you know.

Thanking you,

Yours faithfully,
Sgd/. . . . .
B. D. Dharmasena. "

On a consideration of the above evidence and the sequence of the letters $1D_{11}$, $1D_{12}$ and P_{10}, I am of the opinion that Whittalls Estates and Agencies Ltd., were agents of the proprietors of the estate and were duly authorized to make the acknowledgment contained in P10. It is to be noted that none of the defendants-appellants gave evidence, denying the authority of Whittalls Estates and Agencies Ltd., to address P10 to the plaintiff. Moreover, the defendants-appellants in their written submissions filed in the District Court, have stated thus :—

> "The 2nd and 8th defendants are the owners of Blackwater Estate. The 1st defendant was the managing agent of the said estate from 1.11.63 until 31.3.69 and Messrs. Whittalls Estates and Agencies Ltd., was the managing agent of the said estate from 1.4.69 to 1.5.71 on the terms and conditions set out in $2D_4$.".

I accordingly hold that P_{10} constitute an acknowledgment of the debt by an agent "duly authorized" and is sufficient to take the case out of prescription. However, as submitted by Mr. de Silva, Whittalls Estates and Agencies Ltd., had no authority to acknowledge debts prior to 1.4.69. The finding of the District Judge was that the orders made up to 31/3/69 amounted to Rs. 34,637/03. This finding was not challenged before us. The amount payable to the plaintiff by the 2nd to the 8th defendants would, therefore, be reduced to Rs. 71,128/57 with legal interest from date of action.

The plaintiff-respondent is entitled to a decree in the said sum of Rs. 71,128/57 with legal interest from date of action against the 2nd to the 8th defendants-appellants and we direct that the decree entered be awarded accordingly. Subject to the said amendment of the decree, the appeal is dismissed. The 2nd to the 8th defendants-appellants must pay the full costs in the District Court and half costs of this appeal to the plaintiff-respondent.

ATUKORALE, J.—I agree.

Appeal dismissed
with reduction in decreed amount.