ADJEI AND ANOTHER v. PIE [1975] 1 GLR 62-68

COURT OF APPEAL, ACCRA

4 NOVEMBER 1974

APALOO, ANNAN AND FRANCOIS JJ.A.

Accounts—Reference—No preliminary issues to be tried—Reference of issue to referee—No objection raised against order of reference—Defendants fully participating in reference and adducing evidence before referee—Whether trial judge erred in referring issue to referee—Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N. 140A), Order 15.

Accounts—Referee appointed by court—Terms of reference—Whether referee usurped jurisdiction of court in his investigation of accounts—L.N. 140A of 1954, Order 15.

HEADNOTES

In a writ of summons issued by the plaintiff against the defendants "for an order of account to be taken of all sums received and paid to the defendants as agents for the plaintiff by the State Cocoa Marketing Board as purchase price of a cocoa shed built by the plaintiff " the trial High Court judge referred the issue to the registrar of the High Court "to go into." This order was not objected to by the defendants who participated fully in the reference and adduced evidence before the registrar. Subsequently the registrar made his recommendation in favour of the plaintiff. The defendants unsuccessfully challenged the registrar's recommendation before a different judge of the High Court. On appeal to the Court of Appeal, counsel for the defendants submitted that the learned High Court judge erred in referring the issue of accounts to a referee in so far as there were preliminary issues to be tried and that the referee had usurped the jurisdiction of the court inasmuch as he exceeded his terms of reference. Counsel further submitted that the learned judge had breached Order 33, rr. 2 and 4 of the Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N.140A), which should have been applied.

Held, dismissing the appeal: (1) having regard to the nature of the endorsement on the writ and the facts of the case, Order 15 of L.N. 140A, was the appropriate Order to apply. Rule 1 of Order 15 made it obligatory on the part of the trial judge to order accounts unless his attention had been called to some preliminary issues to be tried. On the evidence there were no such preliminary issues as to the rights of the parties which required a determination. The only issue posed was whether any moneys due to the plaintiff had been settled. As no protest was made by the defendants against the order of reference and as the defendants fully participated in the reference before the registrar, playing out their own role in adducing evidence as to what was due or not due, they could not now be heard to complain that a preliminary issue had been ignored.

City Auto Parts Supply v. Dapaah, Court of Appeal, Cyclostyled Judgments, July–December 1957, p. 4, unreported, considered. Garnham v. Skipper (1885) 29 Ch.D. 566, C.A. and Re Gyhon; Allen v. Taylor (1885) 29 Ch.D. 834, C.A. distinguished.

(2) Order 15 of L.N. 140A did no more than permit investigations into accounts between principals and accounting parties. On the facts there [p.63] was no erosion through usurpation of the High Court's jurisdiction by the referee who in no way exceeded his terms of reference. Taylor v. Davis [1961] G.L.R. 387 at p. 394, P.C. applied.

CASES REFERRED TO

(1) Woods v. Oliver (1880) W.N. 5 1.

(2) Garnham v. Skipper (1885) 29 Ch.D. 566; 22 L.T. 239, C.A.

(3) Re Gyhon; Allen v. Taylor (1885) 29 Ch.D. 834; 54 L.J.Ch. 945; 53 L.T. 539; 33 W.R. 620, C.A.

(4) City Auto Parts Supply v. Dapaah, Court of Appeal, Cyclostyled Judgments, July–December, 1957, p. 4, unreported.

(5) Re Edward's Questions (Practice Note) [1961] 1 W.L.R. 1285; [1961] 3 All E.R. 580; 105 S.J. 649.

(6) Re Humphrey and Humphrey [1917] 2 K.B. 72; 86 L.J.K.B. 775; 117 L.T. 7; 61 S.J.,382, C.A.

(7) Taylor v. Davis [1961] G.L.R. 387, P.C.

NATURE OF PROCEEDINGS

APPEAL against the ruling of the High Court wherein the defendants challenged the report of the referee who had investigated accounts between the plaintiff and the defendants. The facts are fully stated in the judgment of the court.

COUNSEL

C. Hayfron-Benjamin for the appellants.

Attobrah for the respondent.

JUDGMENT OF FRANCOIS J.A.

Francois J.A. delivered the judgment of the court. After hearing argument on 10 June 1974, we dismissed this appeal and reserved our reasons. These we now give.

The plaintiff sought the recovery of moneys he had expended at the defendants' request in the erection of a cocoa shed and an appurtenant building at Abesewa in Ashanti. It was the plaintiff's case that when the buildings were completed, the State Cocoa Marketing Board purchased them and paid the sum of ¢7,426.00 to the defendants who retained the said sum. The failure of the defendants to deliver to the plaintiff what he considered his due, led to the present action. The relief the plaintiff claimed was however couched as follows:

"For an order of account to be taken of all sums recovered and paid to the defendants as agents for the plaintiff by the State Cocoa Marketing Board as purchase price of a cocoa shed built by the plaintiff and sold to the said Board, and payment of the amount found due to the plaintiff on taking such an account."

Pausing for a moment, it would seem that the writ was ineptly endorsed. We think as no detailed or complex accounts were involved, the remedy sought should have been the recovery of the amount actually expended on the building, less any payments, or in the alternative, the purchase price paid by the State Cocoa Marketing Board to the defendants less any valid deductions.

[p.64]

Be that as it may, when the matter came before the trial court, the learned judge referred the “issue” of accounts to the registrar of the High Court, as referee, “to go into.”

It is not clear whether the parties gave their prior consent to this course but on the record, there is no suggestion that the order was questioned. Indeed the parties appeared before the registrar and gave their respective accounts of the matter. Thereafter the referee made recommendations in a report which came before a different judge of the High Court for adoption.

The referee’s report concluded against the defendants. They promptly challenged it and indicated as the basis of their non-acceptance the fact that it was not supported by the evidence adduced.

The learned trial judge found no merit in this submission and delivered himself thus:

“I am satisfied that the evidence is overwhelming that the buildings in question were solely financed by the plaintiff and that the two defendants collected the purchase price of ¢7,426.00 paid by the State Cocoa Marketing Board. Save the legitimate deductions of income tax and bank charges as found by the referee, there has been paid to the plaintiff the bare ¢2,000.00. The balance of ¢5,123.00 withheld by the defendants is money had and received to the plaintiff’s use.”

The learned judge consequently endorsed the referee’s findings and gave judgment for

the plaintiff.

In arguing the appeal before us, Mr. Charles Hayfron-Benjamin, counsel for the appellants, has left the merits severely alone, and made the sheet-anchor of his submissions the irregularity of referring the matter to a referee for the taking of accounts. He has questioned the validity of a reference when there remained settled triable issues to be resolved. He has also castigated the trial court for allowing the referee to usurp the court's functions.

In the second additional ground of appeal, his contention is formulated thus:

"The referee having exceeded his powers by conducting a full scale trial usurped the functions of the judge and it was therefore wrong in law for the trial learned High Court judge to adopt the proceedings before the referee in substituting for a hearing on the merits which the learned trial judge should have conducted."

In giving the merits a wide berth it would seem that learned counsel was faced with a Hobson's choice, as the facts were completely against him. The plaintiff appears to have been a man of some wealth and his benevolence had found public expression in the assistance he gave communal schemes. Indeed it was his public spiritedness that led to his agreeing to erect the buildings the subject of this action. The evidence that the plaintiff laid out his wealth in securing the erection of the buildings cannot be optimistically challenged. Counsel for the defendants has consequently foraged in fresh pastures and advanced new arguments before us. He has [p.65] argued that since the summons was endorsed for an account, the trial court should have been guided by Order 15 of the Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N. 140A). Learned counsel has contended that there appeared other matters to be tried by the court therefore the learned judge erred in referring the "issue" of accounts to the referee.

Order 15, r. 1 is as follows:

"Where a writ of summons has been indorsed for an account, under Order 3, rule 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the Court or a judge that there is some preliminary question to be tried, an order for proper accounts, with all necessary inquiries and directions, shall be forthwith made."

It does not appear that the defendants urged "by affidavit or otherwise" that there were preliminary issues to be tried. The mere fact that there were other stated issues did not make those issues "preliminary" ones.

It seems that as no protest was made and the defendants fully participated in the reference before the High Court registrar, playing out their own role in adducing evidence as to what was due or not due, they cannot now be heard to complain that a

preliminary issue had been ignored. The very rule makes it obligatory on the part of the judge to order accounts, unless his attention had been called to "some preliminary question to be tried."

Putting aside, for the moment, the fact that the proper relief sought was not an inquiry into accounts, the conclusion has not been dispelled that any error the learned judge fell into was not largely contributed to by the defendants themselves, in their failure to point out what they regarded as preliminary issues. We ourselves see none.

Counsel for the defendants next relied on Order 33, rr. 2 and 4 of L.N. 140A urging that they had been breached. Order 33, rr. 2 and 4 are as follows:

"2. The Court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

"4. Where any account is directed to be taken, the accounting party, unless the Court or a Judge shall otherwise direct, shall make out his accounts and verify the same by affidavit. The items on each side of the account shall be numbered consecutively and the account shall be referred to by the affidavit as an exhibit and be left in the Judge's chambers, or with the official or other referee, as the case may be."

It is our view that the indebtedness of the defendants was not in real dispute. It was the quantum of money due that could be challenged. In [p.66] those circumstances, if a choice had to be made it was Order 15 and not Order 33 of L.N. 140A which should be invoked.

It seems also that if there have been breaches of these rules, the greatest offenders have been the defendants who failed to tabulate their accounts and verify them by affidavit as required by the rules. We see no impediment which disabled the defendants from stating in an affidavit and indeed urging before the learned judge himself, that there was no issue of accounts for which inquiries should be ordered. For a party is entitled to say that the whole account is disputed: see Woods v. Oliver (1880) W.N. 51.

We have ourselves considered the case of Garnham v. Skipper (1885) 29 Ch.D. 566, C.A. where it was held that there was error if a judge sent issues involving priorities of mortgages and fraud as well as accounts to a referee under Order 33, r. 2 of the Supreme Court Rules, 1883 (now Order 43, r. 2 of the Supreme Court Rules, 1967) when that step would dispose of the entire case, i.e. mortgages, fraud and accounts. After examining the rule (which is identical with our own Order 33) Cotton L.J. held at p. 570 as follows:

"The expression 'necessary inquiries and accounts' shows that it was not intended to authorise the sending of the whole case to chambers, but only the directing such

accounts and inquiries as are subsidiary to determining the rights of the parties."

That case is clearly distinguishable from the present one. In the instant case, the plaintiff claimed " an order of account to be taken of all sums received and paid to the defendants as agents for the plaintiff by the State Cocoa Marketing Board as purchase price of a cocoa shed built by plaintiff.

There were no preliminary issues as to the rights of the parties which required to be determined; it could not be denied either that the sole issue of indebtedness would dispose of the entire case leaving no subsidiary issues, unlike the Garnham v. Skipper case (supra) where issues involving fraud and prior legal rights under mortgages still remained to be resolved. The issue raised on the defendants' pleadings in respect of the plaintiff's claim amounted to no more than a challenge whether any moneys due had been settled or not. In those circumstances it could not be said that there were major and subsidiary issues. We reiterate that in our view only one essential issue was posed. It is for that reason that the trial judge after ordering the registrar to go into accounts added that " the action if it is to proceed to trial should be on the basis of the issues agreed to by the parties." The learned judge clearly anticipated the inquiry ending before the registrar.

In Garnham v. Skipper (supra) Cotton L.J. was cautious enough to state at p. 569 that "If this had been a case where the Judge had exercised his discretion under an order which gave him a discretion, we should not have interfered." Having regard to the nature of the endorsement on the writ and the facts herein, we think in all circumstances Order 15 was the more appropriate order. Consequently the judge, in the absence of [p.67] any preliminary issue being brought to his notice, had a mandatory duty to order the taking of accounts. We think the matter had been extended beyond the periphery of discretion.

We do not think there is substance either in the charge that the judge ordered special accounts to be investigated for which the strictures in Re Gyhon; Allen v. Taylor (1885) 29 Ch.D. 834, C.A. cited by counsel for the appellants would apply. That case established that special accounts would not be ordered if the right to it depended on the plaintiff establishing a case at the hearing.

Counsel for the appellants next referred us to the case of City Auto Parts Supply v. Dapaah, Court of Appeal, Cyclostyled Judgments, July–December 1957, p. 4. That was a case where a claim for the reimbursement of moneys overpaid by mistake was not sustained. van Lare Ag.C.J. (as he then was) stated therein the law as follows at p. 5:

"At common law an action for an account is maintainable where there is a right of a principal to have such an account relying upon a fiduciary relationship between him and his receiver or agent who acts for the other in the capacity of deputy, steward, factor, substitute, representative or emissary."

Learned counsel can derive no assistance from that case, for far from lending any

support to his contentions, the case endorses the respondent's position; since the facts clearly show the appellants as accounting parties.

We find no substance in the charge of erosion of the High Court's jurisdiction through usurpation by the registrar. That our own rules should be the ultimate guide in determining the jurisdiction of the court cannot be gainsaid. We may usefully illustrate this by referring to the case of Re Edward's Questions [1961] 3 All E.R. 580. There an issue of accounts arose in a matter affecting a married woman's property. When the matter was referred to an official referee for investigation, the referee's jurisdiction was attacked on the ground that both on authority (the Married Women's Property Act, 1882 (45 & 46 Vict., c. 75) and Re Humphrey and Humphrey [1917] 2 K.B. 72, C.A.) and The Annual Practice, 1961 at p. 2098, he was disbarred from acting. It was contended that causes under the Married Women's Property Act, 1882, s. 17 could not be referred to an official referee. This contention was rejected on the basis that the Administration of justice Act, 1956 (4 & 5 Eliz. 2, c. 46), s. 15 and the Supreme Court Rules, Order 36A., r. 2 authorised "the whole of any cause or matter or any question or issue therein to be ordered to be tried before . . . such referee . . .”

It is our view that likewise Order 15 does no more than permit investigations into accounts between principals and accounting parties. On the facts there was no erosion of the High Court’s jurisdiction by a referee appointed by the court. Thus in Taylor v. Davis [1961] G.L.R. 387, where similar issues were raised as to the usurpation of the High Court's jurisdiction the Privy Council in affirming the judgment of the West African Court of Appeal stated at pp. 394–395 thus:

[p.68]

"The main contentions advanced before their Lordships' Board on behalf of the appellant were that the referee had dealt with questions of fact and law which were outside his terms of reference and that the learned judge had erred in that he did not himself hear the witnesses but accepted the findings of the referee . . . When the reference was made 'to go into accounts' it became an essential part of the referee's enquiry to investigate all the business transactions between the parties . . .

Their Lordships are quite unable to accept the submission that the referee exceeded his terms of reference. He did no more than was necessary and essential in the discharge of the duty imposed upon him 'to go into accounts' so as then to report his 'findings' to the court."

We found no merits in this appeal which was grounded on technicalities of dubious validity, and we consequently dismissed it.

DECISION

Appeal dismissed.

S. E. K.