AGENCY - Sale of goods by agent - Liability for – Non payment for goods - Whether agent entitled to sue in his own name to recover price of goods sold **Akosah v. Owusu [1963] 2 GLR 277, SC**

AKOSAH v. OWUSU [1963] 2 GLR 277-284

IN THE SUPREME COURT

5TH JULY, 1963

ADUMUA-BOSSMAN, CRABBE AND AKUFO-ADDO JJ.S.C.

Evidence—Admissibility of—Failure to object—Nature of transaction between the parties—Issue of transaction not pleaded—No objection to the admission of the evidence at the hearing—Evidence not of class inadmissible perse— Whether objection to it can be raised on appeal.

Practice and procedure—Referee—Reference of issue to— Findings of—Whether party adversely affected can question findings.

Agency—Sale of goods by agent—Liability of— Non-payment for goods sold —Whether agent entitled to sue in his own name to recover price of goods sold.

HEADNOTES

The plaintiff, a storekeeper at C.T.L., Koforidua, alleged that the defendant owed him the sum of £G1,443 9s. 8d. as money which he had paid to C.T.L. at the request of the defendant for goods sold and delivered to the defendant. The defendant denied the allegation but admitted owing the plaintiff the sum of £G400 which he had repaid remaining an amount of £G148, an indebtedness which he said arose out of goods sold to his brother for his (defendant's) use and for which he accepted liability.

At the trial, counsel for the defendant suggested, without any objection being raised by counsel for the plaintiff, that to do justice to the parties, the case should be referred to a referee to go into accounts of the parties and also to determine the nature of the transaction between the parties. At the hearing before the referee, the defendant stated that his indebtedness to the plaintiff arose out of a loan made to him by the plaintiff and not out of goods sold and delivered to him. The referee found that the transaction between the parties was one of goods sold and delivered, and also that the defendant was indebted to the plaintiff in the sum of £G1,361 6s. 11d. The trial judge accepted the conclusions of the referee and accordingly gave judgment for the plaintiff in accordance

with his findings. He did not make any comment on the finding as to the nature of the transaction between the parties.

The defendant appealed to the Supreme Court. His counsel contended that the referee's finding as to the nature of the transaction between the parties was against the weight of the evidence. Counsel for the plaintiff, on the other hand, argued that the trial court could not have considered the evidence on that issue since it was not pleaded and as such the evidence on it was inadmissible. Counsel for the defendant further contended that since the plaintiff's claim was in connection with a transaction primarily between the defendant and C.T.L., and as there was no evidence of an assignment by C.T.L. to the plaintiff, the proper person to maintain an action on the claim was C.T.L.

Held:

(1) the evidence relating to the nature of the transaction between the parties was not of the class of evidence generally described as inadmissible per se and since no objection to it was taken at the hearing, no objection to it could be raised on appeal. The trial judge was bound to consider it as evidence properly before him in his overall assessment of the merits of the case. Abowaba v. Adeshina (1946) 12 W.A.C.A. 18 cited.

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(2) Though the defendant was entitled to question the propriety of the referee's finding on the nature of the transaction between the parties, the finding, however, on the issue was right.

(3) As an agent of C.T.L., the plaintiff was entitled to sue in his own name as he had a beneficial interest in the performance of the contract for the sale of the goods to the defendant. Snee v. Prescot (1743) 1 Atk. 245 at p. 248; 26 E.R. 157 at p. 159; Fisher v. Marsh (1865) 34 L.J.Q.B. 177; Dickenson v. Naul (1833) 4 B. & Ad. 638 cited.

(4) On the evidence the defendant's indebtedness to the plaintiff was £G353 9s. 3d.

CASES REFERRED TO

(1) Abowaba v. Adeshina (1946) 12 W.A.C.A. 18

(2) Snee v. Prescot (1743) 1 Atk. 245; 26 E.R. 157

(3) Fisher v. Marsh (1865) 34 L.J.Q.B. 177

(4) Dickenson v. Naul (1833) 4 B. & Ad. 638; 110 E.R. 596

NATURE OF PROCEEDINGS

APPEAL from a judgment of the High Court, Accra, unreported, given in favour of the plaintiff in an action for the recovery of the sum of £G1,361 6s. 11 d. The facts are fully set out in the judgment delivered by Akufo-Addo J.S.C.

COUNSEL

Victor Owusu with him Ohene-Ampofo for the appellant.

K. Narayan for the respondent.

JUDGMENT OF AKUFO-ADDO J.S.C.

The plaintiff was at all material times a storekeeper at Koforidua for Messrs. Commonwealth Trust Ltd. which has now ceased to exist, having been absorbed into the Ghana National Trading Corporation. The defendant is a timber contractor living at Tafo.

Some time in 1958 the defendant finding himself in financial difficulties approached the plaintiff for help. So much is admitted on both sides, and the claim in the action in this appeal arose out of that circumstance.

The plaintiff's claim endorsed on a specially endorsed writ was "for the sum of £G 1,443 9s. 8d. money payable by the defendant to the plaintiff for money paid by the plaintiff to Commonwealth Trust Ltd. at the defendant's request for goods sold and delivered to the defendant from about the 6th November, 1958, to about the 31st January, 1959." It is a somewhat clumsily worded claim; no application was made for summary judgment, but the defendant delivered a defence in which he pleaded as follows:

"1. That the defendant denies the allegation in the plaintiff's statement of claim that the plaintiff paid an amount of £G1,443 9s. 8d. to the Commonwealth Trust Ltd. at the request of the defendant for goods sold and delivered to the defendant.

2. In further answer to the plaintiff 's statement of claim the defendant says that in the year 1958, while the defendant was ill the defendant's brother obtained goods from the plaintiff who was then the storekeeper of Messrs. Commonwealth Trust Ltd., Koforidua, to the value of £G400.

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3. That the defendant upon his recovery adopted the debt of £G400 due to the plaintiff for goods sold and delivered to the defendant's brother for the use of the defendant.

4. That in the month of June, 1960, at the request of the plaintiff an arbitration was held at Old Tafo in respect of this claim; and that the amount due to the plaintiff by the defendant was found to be £G148 and not £G1,443 9s. 8d. as alleged in the statement

of claim.

5. That the plaintiff is bound by the award of the arbitration.

6. That the defendant admits liability in the sum of £G148 only.

7. That at the trial the defendant will plead that by reason of the arbitration award aforesaid, the plaintiff is estopped from re-opening the transaction.

Dated at Kadore Chambers, Accra, this 21st October, 1960."

In the light of the facts that emerged from the evidence that defence was a somewhat soul-less and an unenterprising piece of pleading.

On the 9th March, 1961, counsel for the defendant is recorded to have made the following submission in the court below: "… that to do substantial justice to the parties this case should be referred to a referee to go into the accounts between the parties and to report to the court." Counsel for the plaintiff raised no objection to this submission, and the trial judge thereupon made an order appointing the Senior High Court Registrar a referee to enquire into the accounts between the parties and to investigate or try any issues of fact relating thereto.

One of the issues which the referee had to determine was the nature of the transaction between the parties. The referee's finding on this issue and the trial judge's alleged failure to deal with that finding formed one of the grounds of appeal that were argued before us, and since a determination of the nature of the transaction between the parties is essential for the determination of the nature of the accounts to be taken between them, I think it necessary first to deal with that aspect of the appeal.

The plaintiff's evidence at the hearing by the referee was that when the defendant approached him for financial assistance he told him he had no money to give him, and it was agreed that the plaintiff should supply the defendant goods on credit which he the defendant could sell at reduced prices in order to raise the money he needed. Goods according to the plaintiff were supplied to the defendant on four occasions and the amount claimed by his writ of summons was the balance due in respect of the prices of these goods. The defendant, on the other hand, contended that the plaintiff did actually lend him money upon which he charged interest, but the plaintiff suggested that as the money he lent to the defendant was the property of his employers and as he (the plaintiff) would not be able to account for it in his books it was necessary to give the transaction a different colour from what it actually was. The defendant then agreed to the plaintiff's suggestion that the transaction should be made to wear the colour of one for goods sold and delivered. Debit notes were issued in which a number of goods were itemised and, according to the defendant, the prices stated on these debit notes represented the principal and interest [p.280] in respect of the loans made to him by the plaintiff, and those were the debit notes tendered by the plaintiff in support of his claim.

It is rather strange, to say the least, that so fundamentally vital a defence should not have been pleaded by the defendant whose main averment in his defence was that his indebtedness to the plaintiff arose out of goods to the value of £G400 sold to his brother for his use and for which he accepted liability. The referee found against the defendant on this issue holding that he was satisfied from the evidence that the transaction was one of goods sold and delivered.

The learned judge in accepting the conclusions of the referee made no specific reference to that finding by the referee and this circumstance is one of the defendant's grievances against the judgment. Mr. Narayan, counsel for the plaintiff, however, submitted that the learned judge could not have considered the evidence on that issue because that issue not having been pleaded the evidence on it was inadmissible. I do not agree. The evidence is not of the class of evidence generally described as inadmissible per se, and for that reason if objection was not taken to its admissibility at the hearing no objection to it can be advanced on appeal, and the trial judge was bound to consider it as evidence properly before him in his over-all assessment of the merits of the case: see Abowaba v. Adeshina.1

Although, as I have already stated, the trial judge made no specific reference to the finding of the referee on that issue I think that the trial judge's general acceptance of the referee's conclusions as a whole can be safely held to imply an acceptance of that finding. Be that as it may, the defendant is entitled in this court to raise an argument against the propriety of the referee's finding. The defendant's counsel's complaint was that the referee's finding that the transaction between the parties was one of goods sold and delivered was against the weight of evidence.

Apart from the evidence of the plaintiff there was the evidence of Ampaw a former employee of the defendant and the person who introduced the defendant to the plaintiff. His signature appeared on the debit notes and he said he accompanied the defendant to the plaintiff's shop to take delivery of the goods and he assisted in their disposal for the purpose of raising funds for their business. The referee believed the story which tallied in its essential particulars with the story told by the plaintiff. But it was argued by counsel that the appearance on the first of the debit notes of the inscription "proceeds used against the acquisition of Pimpimso and Awenkori Forest Timber Land" raised a suspicion by reason of the fact that it was unusual to find such an inscription on a debit note for goods sold and delivered and that the transaction could not have been what the plaintiff claimed it to be. It is difficult to appreciate this argument. In my view the word "proceeds" would seem to me to confirm the plaintiff's case that he sold goods to the defendant. One can hardly spell out anything coherent in the defendant's evidence on this point, and I think the referee was plainly right in his finding.

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Counsel for the defendant raised a point concerning the nature of the plaintiff's claim.

This point is expressed in two grounds of appeal which read as follows:

"The transaction being primarily between the defendant and Commonwealth Trust Ltd., of which the plaintiff was an employee, the learned trial judge erred in law in confirming the decision of the referee instead of dismissing or non-suiting the plaintiff as there was no evidence of assignment by the said company or a request by the defendant for the plaintiff to pay the said debt.

There is not an iota of evidence in support of the plaintiff 's claim that the sums claimed were being so claimed from the defendant because they had been paid to Commonwealth Trust Ltd. at the request of the defendant."

Counsel for the plaintiff in answer to the argument expressed in the above-stated grounds of appeal submitted that the evidence of the plaintiff which was not challenged was that he was forbidden by his employers to sell goods on credit, and that if he did he was entirely responsible for the payment of the price of goods so sold. He argued that the defendant knew, or must be presumed to have appreciated the position, that if he did not pay for the goods purchased the plaintiff would be liable to his employers for their price, and that since the plaintiff's evidence that he had paid the amounts involved in the transaction to his employers was not challenged an implied request to the plaintiff to pay for the goods must be inferred.

I am not very much attracted by the submissions of the defendant's counsel. The question of an assignment hardly arises. Although the claim on the writ could have been more happily phrased, the situation revealed by the evidence and the relevant findings of the referee makes it quite clear that the circumstances surrounding the whole of the transaction were such that, having regard to the plaintiff's responsibility for the goods sold on credit, the plaintiff was placed, by the defendant's default, in a position in which he was compelled to make good to his employers the value of the goods or any balance thereof remaining unpaid, and to that extent a request to pay may be justifiably inferred. Moreover as an agent of Commonwealth Trust Ltd., the plaintiff has a beneficial interest in the performance of the contract for the sale of the goods to the defendant and he is therefore in my view entitled to sue in his own name to recover the price of the goods. See Snee v. Prescot,2 Fisher v. Marsh3 and Dickenson v. Naul4. In any case the defendant has nothing to lose by making payment to the plaintiff, for payment to him as the agent of Commonwealth Trust Ltd. will constitute a discharge of his liability to that company.

On the merits of the plaintiff's claim the referee found that the defendant was indebted to the plaintiff in the sum of £G1,361 6s. 11d. and the trial judge entered judgment for the plaintiff for that amount. The basis of the referee's finding was that on the 30th September, 1958, the 6th November, 1958, the 1st January, 1959, and the 31st January, 1959, the [p.282] plaintiff supplied the defendant goods valued at £G807 17s. 8d., ; £G895 .5s. 8d., £G255 3s. 7d. and £G238 respectively and that payments were made on various dates in the year 1959 by four cheques for the sums of £G400, £G235,

£G100 and £G100 respectively.

The defendant's complaint against that finding was that the price of the goods supplied on the 30th September, 1958, that is; £G807 17s. 8d. should not have been brought into the accounts at all for he specifically paid for these goods, or that that figure having been debited to him a credit for a corresponding amount should have been given him in the accounts. The defendant's contention was that the said sum of £G807 17s. 8d. was paid by him in respect of goods supplied on the 30th September, 1958, and that the four cheques aforesaid amounting to £G835 were tendered in payment of goods supplied subsequent to the 30th September, 1958. The plaintiff tendered in evidence at the reference his copy of the relevant debit note on which appeared the inscription "paid in cash," and explained that the sum of £G807 17s. 8d. marked on the debit note as paid was actually part of the proceeds of the four cheques which he appropriated to the payment of the goods appearing on the debit note. His contention was that it was not the case that the defendant paid; £G807 17s. 8d. and thereafter made four additional payments by the cheques.

The referee did not make any explicit findings in respect of the conflicting contentions put forth by the parties and the only indication that he accepted the plaintiff's case on this point was that in the statement of the account which he annexed to his report he credited the defendant with £G835 being the total of the amounts represented by the cheques and debited him with, among other items, the sum of £G807 17s. 8d. The obvious implication is that he accepted the plaintiff's contention that the total amount paid by the plaintiff was £G835. The learned judge did not carry the matter any further on the road to enlightenment. He pronounced on this issue in the following terms: "I support the referee's report and say, I find that the defendant had only paid £G835 cheques and nothing more in cash to the account of the goods supplied him leaving a balance as found on the statement of account against the defendant."

The plaintiff offered no explanation at the reference why, if the payment of £G807 17s. 8d. was made by cheques, he should have stated on the debit note that it was paid in cash, and indeed the plaintiff's counsel complained in the court below that his client was not given an opportunity to offer an explanation. What opportunity the plaintiff required was not made clear.

What is more, according to the plaintiff when the defendant paid the sum of £G807 17s. 8d. or rather when he appropriated that sum from the sum of £G835 in payment of the supply of the 30th September, 1958, the defendant had bought some more goods from him, and the debit notes show that the next lot of goods supplied was on the 6th November, 1958, and amounted to £G895 5s. 8d. At the time that the plaintiff received the four cheques therefore, the defendant was indebted to him at least [p.283] in the sum of £G1,703 3s. 4d., and why he should be so concerned with identifying part of the amount paid by cheques with the goods supplied on the 30th September, 1958, is something for which no explanation was forthcoming.

It is significant that the plaintiff confined his claim to the period the 6th November, 1958,

to the 31st January, 1959, and the four cheques were paid in 1959, the last of them on the 6th July, 1959. In the absence of any acceptable explanation the defendant's case seems to have the support of the documentary evidence produced by the plaintiff himself. Such an explanation does not appear in the record of evidence taken at the reference and counsel's explanation in his submissions to us falls very far short of the reasonable. The defendant is in my view entitled to a credit for the sum of £G807 17s. 8d.

Another complaint by the defendant was in respect of a sum £G200 which he said he paid to the plaintiff in September 1959 at the premises of Barclay's Bank at Koforidua. The plaintiff denied emphatically at the reference that the defendant ever paid to him any such sum of money at the place alleged, and up to the time of hearing this appeal it did appear that on the evidence before the referee the referee's rejection of the defendant's allegation concerning this payment could not be impeached. But the defendant applied to us for leave to adduce fresh evidence by tendering a receipt for the said sum of; £G200 which the plaintiff gave him but which he had unfortunately misplaced at the time of the reference. We granted him the leave sought and also granted both parties leave to tender any further evidence they might wish to adduce with reference to the payment of the said £G200 to the plaintiff.

The defendant tendered in evidence the said receipt the authenticity whereof was not disputed by the plaintiff, and the plaintiff did not persist in his denial that any payment was ever made to him by the defendant at the premises of Barclay's Bank, Koforidua. The plaintiff contended that that payment was made in respect of a different transaction wholly unconnected with the transaction which is the subject-matter of this appeal. His story which he told from the witness-box was that in August 1959 the defendant called on him for the supply of £G240 worth of matches. He was unable to make the supply, and the defendant arranged with one Kwaku Nuama a store-keeper for Commonwealth Trust Ltd. at Somanya for the supply. Nuama agreed to make the supply but only on the condition that the goods were delivered through the plaintiff who, according to him, assumed responsibility for payment. The sum of £G200 was paid to him in the presence of Nuama at the premises of Barclay's Bank at Koforidua and it was in part-payment of the price of the matches. Nuama was called and he essentially corroborated the story of the plaintiff.

It was a strange story to tell at this stage, and if it is true the wonder is that when the plaintiff was confronted with an allegation concerning this payment at the reference he did not offer the explanation that he offered to this court but instead denied all knowledge of it. It is not a story worthy of credence and I do not believe it.

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I accept as proved the defendant's allegation that he paid the plaintiff this sum of money towards his indebtedness to the plaintiff in respect of the transaction that formed the basis of the claim herein, and the defendant is therefore entitled to a further credit for;

£G200.

In conclusion the appeal is dismissed but the judgment of the court below is varied by substituting for the sum of £G1,361 6s. 11d. the sum of £G353 9s. 3d. for which judgment is accordingly entered for the plaintiff.

Although the defendant did not appeal against the costs awarded in the court below it is only fair that, in view of the result of the appeal and in the exercise of the powers of this court under rules 31 and 32 of the Supreme Court Rules, 1962,5 the costs in the court below be reduced by 50 guineas. The record of the court below shall be amended accordingly.

All sums of money already paid to the plaintiff by the defendant by virtue of the judgment of the court below and in excess of £G353 9s. 3d. plus £G86 3s. costs shall be refunded immediately to the defendant who is granted the liberty to levy execution in the court below, if necessary to enforce the due repayment thereof.

JUDGMENT OF ADUMUA-BOSSMAN J.S.C.

I agree.

JUDGMENT OF CRABBE J.S.C.

I also agree.

DECISION

Appeal dismissed.

Judgment of the court below varied as to the defendant's indebtedness to the plaintiff and costs reduced by 50 guineas.

K.T.

FOOTNOTES

1 (1946) 12 W.A.C.A. 18.

2 (1743) 1 Atk. 245 at p. 248; 26 E.R. 157 at p. 159.

3 (1865) 34 L.J.Q.B. 177.

4 (1833) 4 B. & Ad. 638; 110 E.R. 596.

5 L.I. 218.