

PRIVY COUNCIL

Official Liquidator of M.E. Moola Sons Ltd.

Vs.

Perin R. Burjorjee

P.C.A.No.96 of 1931

(Lord Blanesburgh, Lord Tomlin and Sir George Lowndes JJ.)

03.03.1932

JUDGMENT

LORD TOMLIN J.

1. This appeal is concerned with the question whether a creditor's proof lodged by the respondent in the liquidation of the company whose liquidator is the appellant and rejected by the liquidator was properly so rejected.
2. On 23rd December 1929, the trial Judge on the original side of the High Court of Judicature at Rangoon held that the proof was rightly rejected. On 4th August 1930 this decision was reversed on appeal to the appellate side of the Court. The proof in question was for Rs. 68,219-15-0, damages alleged to have been incurred by the respondent by reason of the failure of the Company to complete the purchase of property agreed to be sold by the respondent by an agreement dated 27th July 1921. The only question in issue or debated at the hearing before the trial Judge, or on the appeal was whether the agreement for sale (on the face of which the purchaser was one M. E. Moolla) had been entered into by Moolla on his own account or whether the Company was the undisclosed principal of Moolla in respect of such agreement.
3. The trial Judge held that Moolla had entered into the agreement as principal and had afterwards transferred the benefits of it to the Company and that therefore the Company was under no liability to the respondent. The appellate Court held that the Company was the undisclosed principal and was liable to the respondent and that the proof had been wrongly rejected. Against this decision the liquidator appealed to His Majesty in Council and before their Lordships Board raised the contention that the agreement of 27th July 1921 required registration under the Indian Registration Act, that it had not been registered and that as it had not been registered it could not be

used for any purpose whatever and ought to be ignored by the Court with the result that any claim for damages based by the respondent upon breach of that agreement must necessarily fail. The questions therefore which arise for their Lordships' consideration are:

"(1) Ought the appellant to be allowed to raise now for the first time before the tribunal of last resort the question as to the registration of the agreement?

(2) If the question as to registration can now properly be raised (a) did the agreement which admittedly was not registered require registration and (b) if it did require registration what is the effect of nonregistration in regard to the respondent's right to claim damages under the agreement?

(3) If the question as to registration cannot now be properly raised or if it can be properly raised but upon consideration of the merits of the question it is held that the nonregistration of the agreement does not preclude the respondent from putting forward a claim for damages under the agreement whether the company was or was not the undisclosed principal of M. E. Moolla in regard to the agreement?"

4. To enable these questions to be considered, it will be convenient to state the facts as far as they are proved or admitted. The Company was formed under the Indian Companies Act 1913, on 21st January 1921, as a private company. Clause 3 (6) of the Memorandum of Association enabled the Company to acquire by purchase, lease, exchange or otherwise land buildings and hereditaments of any tenure or description in Burma. By Articles of Association 115 and 116 (2) the directors had power to purchase for the Company any property which the Company was authorised to acquire.

5. At a meeting of the Board of Directors held on 1st February 1921, Moolla was appointed Managing Director, with power to manage the business of the Company as he thought fit. He was further authorized to purchase and sell any property (moveable or immovable) as he thought best in the interest of the company. The issued share capital of the company stood as to about 90 percent thereof in the name of Moolla, and as to the remainder in the name of his mother Mariam Bee Bee. The trial Judge said:

" The company was essentially a one man Company, being for all practical purposes Moolla incorporate."

6. The company's office was also Moolla's office. The agreement of 27th July 1921 was made between the respondent (described as the vendor) and Moolla (described as the purchaser) and contained no reference to the company. Omitting formal parts, the

agreement was as follows ;

- "1. The vendor agrees to sell to the purchaser, and the purchaser shall purchase from the vendor the properties described in the schedule hereinunder written measuring 12.54 more or less at or for the price of Rs. (twelve thousand five hundred) per acre.
2. That the purchaser had paid to the vendor Rs. (10,000) ten thousand as earnest money, the receipt of which the vendor doth hereby acknowledge.
3. That the purchaser agrees to complete the conveyance within three months from 12th July 1921, by paying the balance of the purchase money calculated at the rate aforesaid save and except a sum of Rs. (1,00,000) one hundred thousand which sum is to remain outstanding as in the clause next provided.
4. The vendor agrees to keep the said balance of unpaid purchase money namely Rs. (1,00,000) one hundred thousand invested with the purchaser for a period not exceeding three to five years as the purchaser may wish on the purchaser paying interest thereon at the rate of eight per annum payable monthly and the same secured by the equitable mortgage of the premises hereby agreed to be sold, that is, by the purchaser depositing the title deeds of the said premises including the conveyance in his favour with the vendor.
5. That the vendor shall make out a good and clean title to the said premises and produce for inspection the title deeds as soon as required by the purchaser."
7. The schedule contained a description of certain immovable property in Burma belonging to the respondent. The acreage is given as 12'54 acres and on this basis, the total purchase price under the agreement would be Rs. 1,57,375. Upon the execution of the agreement Rupees 10,000 was paid to the respondent as earnest money. The respondent had no personal contact with Moolla in connexion with the negotiation for or the execution of the agreement. She acted by brokers throughout.
8. On 31st December 1921, the Board of Directors held a meeting, the Minutes of which state that

" the following properties were purchased by the Managing Director during the course of the year on behalf of the company."
9. A list of twenty-eight properties follows. The second on the list under date 13th July 1921, is the property, the subject of the agreement of "27th July 1921. of the twenty-eight properties in the list twenty-five had been bought in the name of the company, three properties (including the respondent's property) had been purchased in Moolla's name and admittedly the two properties other than the respondent's property had been

purchased on the company's behalf.

10. On 30th March 1923, the purchase being uncompleted, the respondent's brother-in-law wrote to Moolla, asking for the balance of the purchase-price, or at least Rs. 15,000. Moolla replied by executing four promissory notes in the respondent's favour, for a total of Rupees 40,000. On 20th November 1923, the respondent gave to Moolla a receipt for Rs. 1,000 in respect of interest. Further payments of interest were made up to February 1927, but the purchase was never completed.

11. Moolla at the trial admitted that Rupees 15,000 in respect of the promissory notes and all interest was paid out of the company's funds. He alleged that the earnest money was paid by himself but refunded to him by the company. He stated that all the company's books prior to 1924 were destroyed under his instructions, and that he had no books to show that the earnest money came originally out of his own moneys. He alleged that he had purchased the property on his own account and had subsequently transferred the benefit of the agreement to the company. He produced no document to evidence the alleged transfer.

12. On 6th April 1927, a creditors' petition was presented to wind up the company, and an order for winding up was made on 21st June 1927, and one Hormasji was appointed liquidator. Between the presentation of the petition and the making of the order, viz., on 18th June 1927, the respondent at the instance of Moolla, filed in opposition to the petition, an affidavit prepared by Moolla's clerk. In this affidavit she stated that she was a secured creditor of the company for Rs. 1,31,137-8-0. This was the sum then calculated to be owing under the agreement of 27th July 1921. Moolla himself was declared insolvent on some date between April and June 1927. His assets were practically nil. He did not enter the name of the respondent as a creditor in the schedule relating to his own affairs which it was his duty to file in the insolvency proceedings. (After discussing the evidence, the judgment proceeded). The only matter debated before the Judge who tried the petition was the question of fact whether the company was in connexion with the purchase the undisclosed principal of Moolla. The learned Judge held that Moolla purchased on his own account. The respondent appealed. The question, and the only question, debated before the appellate side was that which had been debated below. The appellate side reversed the trial Judge and held that the company was the principal in the matter.

13. Subsequently the appellant applied for a review of the judgment on the ground that Ex. B to his affidavit had been, erroneous in so far as it showed the earnest money to

have been paid out of the company's funds on 27th July 1921, the books of the company for 1931 having, been destroyed and there being therefore no evidence of such payment. The application for a review of judgment was rejected.

14. On 7th January 1931, leave to appeal to His Majesty in Council was granted to the appellant. In his application for such leave, the appellant for the first time raised the question of the nonregistration of the agreement in these terms :

" This Honourable Court has omitted to take note of the fact that the agreement of sale of 27th July 1921, had not been registered and was thereby invalid and inoperative."

15. The same point was raised in his case before their Lordships' Board.

16. The first question for consideration, therefore is : ought the applicant to be allowed at this stage to raise for the first time the point of nonregistration ?

17. In *Connecticut Fire Insurance Co. v. Kavanagh* Lord Watson, in delivering the judgment of their Lordships' Board, said as follows :

" When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea."

18. Section 49, Registration Act, which states the results of nonregistration is, so far as material, as follows;

"49. No document required by Section 17 to be registered shall (a) affect any immovable property comprised therein * * * * or (c) be received as evidence of any transaction affecting such property.... unless it has been registered."

19. Their Lordship's are satisfied that therein is nothing in the section cited when properly construed to compel the Court to take notice of the no registration of an admitted document unless at any rate such document must, if treated as effective, be

the foundation of a judgment affecting immovable property comprised in such document.

20. Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further the proceedings do not in any respect affect any immovable property. The immovable property affected by the agreement long since passed out of the picture, and the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal.

21. Their Lordships therefore regard themselves as free to consider upon general principles, whether the appellant ought to be allowed to raise the point of non registration. They are satisfied that he ought not to be allowed to do so. It has already been pointed out that the circumstances in which the appellant's petition founding these proceedings was launched are by no means clear. The parties are not agreed upon the facts. There are indications of a course of conduct or agreement on the part of the liquidator which would preclude him from raising any point in the proceedings except that as to the respective positions of the company and Moolla in regard to the agreement of 27th July 1921.

22. In this state of the evidence, it would not in their Lordships' judgment be in accordance with the principles indicated by Lord Watson, in the judgment already cited, to take into consideration at this stage for the first time the point of the non registration of the document.

23. It becomes therefore unnecessary to consider the second question as to the necessity for registration.

24. There remains the third and last question, one of fact upon which the Courts below have differed, viz., was the Company the undisclosed principal of Moolla in relation to the agreement of 27th July 1921. Their Lordships are satisfied that the company was the undisclosed principal of Moolla. All the contemporary documents support this view. There is nothing in Moolla's conduct inconsistent with it. There is much in his conduct which, though not necessarily inconsistent with the other view, points strongly in the direction of his having acted as the company's agent throughout. His own evidence was obscure and contradictory, and he was not seen in the witness box by the trial Judge. In their Lordships' opinion the learned Judges of the appellate side reached a correct conclusion upon the issue of fact.

25. In the result therefore the appeal fails and must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Cases Referred.

[1892] AC 473 = 61 LJ PC 50 = 67 LT 508=57 JP 21, at p. 480.