

RICHARD SYDNEY SMITH

v.

FIJI MOCAMBO HOLDINGS LTD.

[SUPREME COURT, 1972 (Goudie J.), 21st January, 3rd February]

Civil Jurisdiction

Jurisdiction—court—action for money due under a contract—plaintiff company carrying on business in Fiji—nothing in pleadings indicating where payment to be made—debtor's duty to seek out creditor—defendant acting under business name—personal residence of defendant in Fiji—Magistrates' Courts Rules (Cap. 10) 0.13 r.1(a)—Rules of the Supreme Court 1968, 0.11 r.1(g).

In an action in the Lautoka Magistrate's Court the plaintiff company claimed moneys said to be due and payable for accommodation and other services rendered to clients of the defendant who, it was alleged in the statement of claim, carried on business as a travel agent in Sydney, Australia, under the name "Fiji Travel Service". The defence claimed, inter alia, that the Fiji Court had no jurisdiction on the ground that the contract between the parties was made (if at all) in Sydney.

Held: Having regard to Order 13 rule 1(a) of the Magistrates' Courts Rules and to Order 11 rule 1(g) of the Rules of the Supreme Court 1968, the Fiji court had jurisdiction on two grounds —

(a) There being nothing in the pleadings to say where the moneys were payable under the contract it was for the debtor to seek out his creditor at his residence or place of business and the registered office of the plaintiff company was shown by the Writ of Summons to be in Nadi.

(b) The defendant's address was shown in the writ as being in Fiji and whether this was intended to be his residential or business address this was sufficient to confer jurisdiction.

Cases referred to :

Sadler v. Whiteman [1910] 1 K.B.868; 102 L.T.472: on appeal [1910] A.C.514.

R. v. Holden [1912] 1 K.B. 483; 106 L.T.305.

Appeal to the Supreme Court from a judgment of the Magistrate's Court; reported only on the question of jurisdiction.

C. L. *Jamnadas* for the appellant.

B. *Sweetman* for the respondent company.

3rd February 1972

GOUDIE J.:

- A** This is an appeal against a judgment for \$207.71 and costs in favour of the respondent Company, the plaintiff in the lower Court.

Referring to the pleadings in the lower Court, the Statement of Claim alleged that between November 1967 and May 1968 the defendant carried on business in Sydney, Australia as a Travel Agent under the name "Fiji Travel Service" and made bookings through his servants or agents with the plaintiff Company as a result of which the plaintiff **B** Company provided accommodation and other services to clients of the defendant. The defendant, therefore, owed the plaintiff Company an amount of \$207.71 as per particulars annexed to the claim.

The defence was a complete denial of all the alleged transactions. Additionally, the defendant denied that the trial Court in Fiji had any jurisdiction. This denial was worded as follows:— "The alleged contract **C** (which is not admitted) was made, if at all, in Sydney, in the State of New South Wales in the Commonwealth of Australia, and that the Court has no jurisdiction to adjudicate on the plaintiff's claim."

There are eight grounds of appeal, of which I intend to deal first with Ground 8, relating to jurisdiction. This ground reads as follows: "The **D** learned Magistrate erred in fact and in law in holding that the Court had jurisdiction to adjudicate on the plaintiff's claim against the defendant Richard Sydney Smith."

It will be noted that this ground of appeal is wider in its terms than the denial of jurisdiction contained in the Defence since in the ground of appeal the lack of jurisdiction is not confined to the jurisdiction being **E** dependent upon the place of the making of the contract.

With respect to the learned trial Magistrate, I do not think the fact that the defendant called one witness from New South Wales, and therefore might have called others, is relevant to the question of whether or not the Court had jurisdiction. It might have been relevant had he been considering the most convenient venue for trial within the jurisdiction, **F** having first decided that there was jurisdiction in the Fiji Courts. However, the learned Magistrate continued "I am also satisfied on the evidence and the rules that this Court has jurisdiction to adjudicate in this matter." Unfortunately, the trial Magistrate was not at all specific in regard to which particular part of the evidence and which particular rules he considered gave his Court jurisdiction. It is necessary, therefore, for this Court to decide for itself whether there was any ground **G** upon which the Magistrate could properly have relied on which to found jurisdiction.

In my opinion, evidence alone cannot give jurisdiction and there must be something in the pleadings themselves to show at least prima facie jurisdiction.

H Order XIII Rule 1(a) of the Magistrate's Court Rules provides that suits arising out of breach of contract "may be commenced and determined in the Court nearest to the place in which such contract ought to have been performed or in which the defendant, or one of the defendants resides or carries on business."

Since there was nothing in the pleadings to say where the monies were payable under the contract, it was, prima facie, the duty of the debtor to seek out his creditor at his residence or place of business. It follows that in these circumstances, a failure to pay money due to a plaintiff who resides or carries on business within the jurisdiction is sufficient to give jurisdiction to the Court of the country in which the plaintiff resides or carries on business, irrespective of whether the defendant resides or carries on business within the jurisdiction. (See also Order 11 Rule 1(g) of the Supreme Court.) Since the registered office of the plaintiff Company was shown in the Writ of Summons as being at Nadi in Fiji, I consider the trial Court had jurisdiction on this ground. A
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Moreover, the defendant's address was shown in the Writ of Summons as "Castaway Resort, Qalito". Since paragraph 1 of the Statement of Claim referred to the defendant carrying on business in Australia, I think it is tolerably clear that the defendant's address, as shown, was intended to be his place of residence, but, even if it was intended to be his business address at the date of the Writ of Summons, this also would be sufficient to give the trial Court jurisdiction. C

I do not think that the place of registration of the business name "Fiji Travel Service" is of any great importance. The plaintiff Company chose to sue the defendant personally. It was, therefore, incumbent on the plaintiff Company to prove that the balance of probabilities favoured the view that the defendant owned the Fiji Travel Service over the period of the transactions. It did not, however, need to prove it had a right to sue "Fiji Travel Service" in Fiji. As Farwell L.J. said in *Sadler v. Whiteman* [1910] 1 K.B. (C.A.), at page 889, "In English law a firm, as such, has no existence . . . the firm name is a mere expression, not a legal entity, although, for convenience under Order XLVIII A, it may be used for the sake of suing or being sued". This particular quotation was adopted with approval by the Court of Criminal Appeal in *R. v Holden* [1912] 1 K.B. at page 487. D
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I find, therefore, that the two reasons I have outlined above the trial Court had jurisdiction in this case.

Dealing briefly with the remaining grounds of appeal: F

Grounds 1 and 2:

In my view these were issues of fact and there was sufficient evidence on which the learned trial Magistrate was entitled to find that the balance of probabilities favoured the view that the defendant was an undisclosed principal of "Fiji Travel Service" and Mrs. Berry was an employee and agent of the firm. The fact that Mrs. Berry may have contravened the Australian law, by failing to disclose the existence of a foreign principal, when registering the business name "Fiji Travel Service" in Sydney, does not in itself, in my view, necessarily render her evidence suspect from the point of view of credibility. Moreover, I think the fact that "Reynolds" was registered as a proprietor for one day only and another company registered as proprietor after the 1st May 1970 lends some support to Mrs. Berry's evidence that she was the owner of the Fiji Travel Service before the 1st of May 1970. Quite clearly, the defendant had interests in G
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- A** many companies, including Piper Investment which paid Mrs. Berry's salary, and the learned Magistrate has, in my view, given cogent reasons for his finding that the defendant was "behind" the Fiji Travel Service, particularly bearing in mind Exhibits M and O and the blank cheque for \$1601.51 given to the defendant by Mrs. Berry.

Grounds 3 and 4 :

- B** The evidence of Mr. Whitehouse was not in my view particularly relevant and much of it was hearsay from books, covering a period when he was not an accountant with the Company. I do not consider that, because Piper Investment paid Mrs. Berry, this necessarily means that she could not have been a Smith employee, particularly bearing in mind that he was Director and Manager of Piper Investment and a lady called Kathleen Phyllis Smith of Castaway Island, defendant's Fiji address, was another Director of this Company.

Ground 5 :

- D** I think there is some merit in this ground of appeal, but the fact that the learned Magistrate somewhat confused the defendant's position as an individual with that of his position in the Piper Investment is not, in my view, sufficient ground for saying that the Magistrate's ultimate conclusions, to the effect that the defendant was in fact owner and undisclosed principal of Fiji Travel Service, were wrong.

Grounds 6 and 7 :

- E** Since the defendant was sued as an individual, and the Fiji Court had jurisdiction, I do not think the Australian law relating to the Business Names Acts was particularly relevant, once the trial Magistrate had accepted that the prima facie evidence of ownership provided by the registration of the alleged proprietors of Fiji Travel Service had been rebutted by what he clearly regarded as reliable evidence given by Mrs. Berry.

- F** I am not altogether convinced that the trial Magistrate ought to have deducted money owing in respect of the period after the 1st of May 1970, because I think it is possible that the monies became due before this period. However, Mrs. Berry considered that she was responsible for all debts accruing after 1st of May 1970, and, since there is some doubt as to the exact date when the payments were due, I do not propose to interfere with the Magistrate's finding in this respect.

- G** The appeal is dismissed with costs.