



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Madan, Potter, JJ.A. and Kneller, Ag. J.A.)

CIVIL APPEAL NO. 1 OF 1981

BETWEEN

ZAVERCHAND RAMJI SHAHAPPELLANT

AND

FULCHAND LADHA SHAH1ST RESPONDENT

ZEDRISH GARMENT FACTORY LIMITED.....2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Harris, J) dated 27th June, 1980

in Civil Case No. 1530 of 1973)

JUDGMENT OF MADAN, J,A

The first respondent, as the plaintiff in the suit instituted by him in the High Court, successfully sued the appellant and the second respondent (a limited liability company, as the first and second defendants respectively, for the recovery of shs.40,000/= said to be money payable to him by the defendants jointly and severally, being the balance of shs.50,000/= lent by the plaintiff to be defendants at the first defendant's request and on his behalf.

The learned judge rejected the appellant's defence that he never requested the plaintiff to lend money to the company for and on his behalf as alleged, that he also never acted in his personal capacity in this respect, and that there was no privity of contract between him and the plaintiff. The learned judge entered judgment as prayed against the two defendants jointly and severally for shs.40,000/=.

The appellant has argued before us that the learned judge's decision was wrong, and he should have found that the appellant merely negotiated a loan as agent for the company without incurring any personal liability for repayment thereof. The fourth ground of appeal is that the plaintiff's evidence indicated if at all, that the appellant was a guarantor for the loan, and he was not liable as a guarantor because the guarantee was not in writing, nor had it been pleaded.

The plaintiff filed notice of preliminary objection to ground of appeal number 4 that it was neither taken nor pleaded below, was never argued, and was not the subject of any adjudication below, it also being inconsistent with the sole issue argued whether the loan was made jointly to the two defendants or to the company alone. We allowed it to be argued de bene esse.

The learned judge's decision rested upon the credibility of the parties. He stated in his judgment that he had little doubt that the defendants were endeavouring to achieve a position whereby any decree which the plaintiff may obtain would be against the company alone with the result that the plaintiff would recover nothing; that the appellant was an unsatisfactory witness, whose answers to questions were frequently evasive and sometimes unconvincing in the extreme. Further, he said, that the 1974, and the plaintiff knew it was in a financial difficulty when he was approached for assistance. I think it is not likely that the plaintiff would have advanced the loan to the company alone. I note the appellant said in his evidence "when I borrowed the money", "plaintiff paid me shs.20,000/=, "plaintiff was like a brother to me and lent me money without interest", and "if he (plaintiff) had asked me for shs.40,000/= I could have told him to wait." The appellant also signed his name on the back of the three cheques (ex.2) which were issued by the company, after having signed them as a director of the company.

It does not appear to me that on the evidence in the case the judgment of the trial judge is affected by material inconsistencies or inaccuracies or that he otherwise went plainly wrong.

Having been served, the second respondent appeared before us by Mr. Trivedi who did not ask for any order. I would dismiss the appeal with costs to the first respondent. As potter, J.A. and Kneller, Ag. J.A. agree it is so ordered.

Dated at Nairobi this 11th day of May, 1982.

C.B. MADAN

JUDGE OF APPEAL

JUDGMENT OF POTTER J.A.

I agree.

Dated at Nairobi this 11th day of May, 1982.

K.D. POTTER

JUDGE OF APPEAL

JUDGEMENT OF KNELLER, AG. J.A.

I also agree.

Dated at Nairobi this 11th day of May, 1982.

A.A. KNELLER

AG. JUDGE OF APPEAL