BHANABHAI & CO. (Hong Kong) LTD., Plaintiff-Appellee

v.

FERNANDO R. FALAWAATH, d/b/a YAP WHOLESALERS, Defendant-Appellant

Civil Appeal No. 145

Appellate Division of the High Court

Yap District

March 23, 1978

Appeal from judgment for plaintiff in suit to collect for merchandise sold and delivered to defendant. The Appellate Division of the High Court, Nakamura, Associate Justice, held that affirmative defense that plaintiff had no license to do business in the Trust Territory would not be considered on appeal where it was raised below only by the answer to the complaint and not by evidence.

Actions—Defenses—Lack of License To Do Business

Lack of a license to do business in the Trust Territory is an affirmative defense to a suit to collect for merchandise sold and delivered and must be raised by evidence at trial as well as by pleading, and where it was pled but no evidence was put forth, the defense would not be considered on appeal and as the case was not exceptional the appellate court would not take judicial notice of the lack of a license. (33 TTC § 3)

Counsel for Appellant: PAUL W. ODEN and DANIEL MCMEEKIN, Micronesian Legal Services Corporation

Counsel for Appellee: NORMAN L. ASHTON, FERENZ, BRAMHALL, WILLIAMS & GRUSKIN

Before BURNETT, *Chief Justice*, BROWN, *Associate Justice*, and NAKAMURA, *Associate Justice*

NAKAMURA, *Associate Justice*

This is an appeal from a judgment entered on May 23, 1975, in which it was adjudged that appellant, Fernando R. Falawaath, d/b/a Yap Wholesalers, owed appellee, Bhanabhai & Co. (Hong Kong) Ltd., $4,668.90 for mer-

chandise sold and delivered, together with interest on said amount at the rate of 6% per annum from March 6, 1973, and appellee's costs of suit.

The pertinent facts of this case, for the purpose of this appeal, are very simple and they are stated hereinbelow.

On December 17, 1973, the appellee filed a complaint alleging, inter alia,

> 2. Within six years last past, defendants became indebted to plaintiff on an open book account for money due in the sum of $10,993.90 for goods sold and delivered by plaintiff at its special instance and request and for which defendant agreed to pay said sum. 3. No part of said sum has been paid, although a demand therefore has been made, and there is now due, owing and unpaid the sum of $10,993.90. . . .

In response to the complaint, the appellant filed his answer on January 16, 1974, and stated, among other things, the following:

> Second Defense. The alleged agreement between plaintiff and defendant is unenforceable by plaintiff because plaintiff is and has been doing business in the Trust Territory without a business permit in violation of 33 TTC § 3, and in the Yap District without a license and bond in violation of Yap District Code §§ 4305 and 4306.

The trial of this case was held on May 22, 1975, and as noted above, the Court found in favor of the appellee.

The hearing on the subject appeal was held before this Court on November 11, 1977. The appellant was represented by the Micronesian Legal Services Corp., and appellee was represented by the law firm of Ferenz, Bramhall, Williams & Gruskin of Guam.

Based on the transcript of the proceedings of the trial, the briefs of both counsel submitted herein and the oral arguments, we find the following to be the primary questions.

1. Whether or not a lack of business license to do business in the Trust Territory is an affirmative defense?

2. Whether it is proper, under the circumstances of this case, for the Appellate Court to take a judicial notice of the lack of valid business license?

In regards to the first question, we find the answer to be in the affirmative:

A defendant, in order to avoid liability or loss of rights by entry of judgment against him, must defend his own interests and make all his defenses legal or equitable; he is entitled to set up by way of defense any fact which will defeat his cause of action in whole or in part. 1 C.J.S. *Actions,* § 22, p. 1063. See also C.J.S. *Bailments,* § 46, p. 501; 35 C.J.S. *Exemptions,* § 160; *United States v. Acme Process Equip. Co.*, 387 U.S. 138, 87 S.Ct. 350, 17 L.Ed.2d 249 (1966); *Brown v. United States,* 524 F.2d 693 (Ct.Cl. 1975).

Although appellant raised the lack of valid licenses by the appellee in his answer, he failed, however, to present even a shadow of evidence at the Trial Court that appellee did not possess a valid license to do business in the Yap District. We hold that it is too late now to raise such issue at the Appellate Division.

The rule is well settled that only in exceptional cases will questions of whatever nature, not raised and properly preserved for review in the trial court, be noticed. *United States v. Chesapeake & Ohio Ry. Co.* (4th Cir. 1954), 215 F.2d 213. See also 5 Am.Jur.2d § 545.

We hold further that this case is not an "exceptional case," and, therefore, will not take notice of issues not raised at the Trial Court.

With respect to the second question, we find the answer to be in the negative.

The propriety of the action to the trial court with respect to judicial notice falls within the operation of the general rule that the appellate court will consider only such questions as raised below. Thus, it has been held that if the court below is not called on to take judicial notice of a fact, either by the counsel or from other facts produced in evidence, and it is one to which the mind of the court would not ordinarily be directed, and it is not noticed by the lower court, then the court on appeal should not consider such

fact in reviewing the ruling of the court below. 5 Am.Jur.2d *Appeal and Error* § 606.

In view of the foregoing, judgment of the Trial Court is hereby AFFIRMED.

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