1953

Paul Pantages v. Sam Arge : Brief of Respondent

Utah Supreme Court

H. G. Metos; Attorney for Respondent;

Case No. 7977

IN THE SUPREME COURT

of the

STATE OF UTAH

PAUL PANTAGES,
Plaintiff and Respondent,

vs.

SAM ARGE,
Defendant and Appellant.

BRIEF OF RESPONDENT

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Attorney for Respondent.

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Appellant's Statement of Facts does not fully set forth the evidence concerning the affairs of the parties, and it is therefore necessary for the Respondent to set out a more complete Statement of Facts.

Sometime in September, 1951 the plaintiff and defendant talked about entering into a partnership to buy and sell grapes. After a few conversations it was decided that they would enter into the grape business and purchase a truck. The parties went to Bennett's Motor

Company in Salt Lake City, Utah and purchased a new Ford truck for the sum of $3,669.88. The plaintiff turned in his Studebaker car as the down payment on the truck, and the sum of $886.84 was credited on the purchase price of the Ford. The balance in the sum of $2,783.04 was payable in monthly installments of $115.96. Title to said truck was taken in the name of the defendant, Sam Arge (see Exhibit 1, Conditional Sales Contract).

About the time of the purchase of the truck there was some talk between the plaintiff and the defendant, defendant's brother, Tom, and Reed Tuft, attorney, about going into a four-way partnership, but these conversations never crystalized into such partnership.

About September 20th, 1951, the defendant sent the plaintiff and Tom Arge to California to buy a load of grapes. The defendant, by Western Union, sent to his brother a money order in the sum of $800.00 to purchase the grapes. A load of grapes in the sum of $620.00 was purchased by Tom Arge and brought to Salt Lake City. The defendant claimed he had the grapes sold in Idaho and he had his brother take the truck load of grapes to Pocatello to sell them. Several days thereafter the truck returned with about forty or fifty boxes of grapes (about 2/3 of a ton) unsold. These grapes were turned over to the plaintiff who sold them for $100.00, which money he turned over to the defendant.

The defendant turned over the truck to the plaintiff and told him that if he wanted to get a load of grapes he could do so for himself individually. Accordingly the

plaintiff, around October 5th, 1951, purchased a load of grapes from California and sold them (R. 33-34). At a later date the plaintiff drove the truck to Boise, Idaho and brought back the defendant's household furniture to Salt Lake City. The plaintiff paid for the gas and oil, and for the expenses of making the trip, out of his own pocket (R. 33). Subsequently, the truck was used by the parties for their personal uses as they desired.

In the early part of June, 1952, plaintiff and defendant met in the office of plaintiff's attorney to bring about a settlement of their affairs, and primarily to induce the plaintiff to allow the truck to be sent to California to be worked by one of the defendant's relatives. Defendant offered the plaintiff $800.00 for his interest in the truck, which offer plaintiff refused (R. 165). A few days thereafter, to-wit, on June 20, 1952, defendant instituted an action against the plaintiff, stating in the Complaint and Affidavit for a Writ of Replevin, that he was the owner of the truck and entitled to immediate possession of the same, and that said truck was wrongfully held by the defendant. Defendant sent a wrecker and picked the truck off the street and placed it in a garage, and, pursuant to his action, the sheriff turned the truck over to the plaintiff who, upon the day of getting possession, caused his action for replevin to be dismissed (R. 65). Plaintiff never saw the truck again and was never advised by the defendant as to its disposition.

Plaintiff, in addition to making the down payment

in the sum of $886.84, paid all the monthly installments on the truck, amounting to the sum of $927.68, and $151.00 in other items, and up to the time of conversion of the truck the plaintiff had paid on the same the sum of $1,965.52. Defendant's only contribution to the truck was insurance on the same amounting to the sum of $124.03.

ARGUMENT

At the trial Appellant contended that he had contributed $1,719.32 to the partnership (see Exhibit 18). However, his evidence and testimony did not substantiate his claims and the Court found that most of his contentions did not exist. In Exhibit "A" attached to the Findings of Fact (R. 194) there is set forth in detail specific findings on the items raised in Appellant's brief.

Respondent will argue Appellant's Points in the order raised by him.

POINTS I and II

Points I and II arise primarily out of the sale of grapes in Idaho. The trial Court found that Appellant netted, from the sale of grapes, the sum of $805.95 after deducting wages from Tom Arge and truck expenses (R. 193). Tom's wages were considered by the Court and proper credit was given in the accounting made by the Court. Likewise, the item of $309.72 complained of by the Appellant was considered by the Court. It is clear

from the evidence that these items were paid by Pantages and Tom Arge (R. 81) and said items were not all expended in the sale of grapes. Many of the items were expenses made by the various parties, both in the sale of grapes and in running the truck for their own personal use. The record discloses that the reason these bills for gas and oil, etc., were turned over to the Appellant was for the purpose of taking tax deductions for the same on the part of the Appellant (R. 178). Under the findings of the Court, Respondent cannot see any merit to Appellant's Points Nos. I and II.

POINT III

The Court found that the insurance on the truck amounted to the sum of $124.03, and that such sum was paid for by the Appellant. The Court gave Mr. Arge credit for this amount in its accounting. Appellant contends that he is entitled to a credit of $330.29, or $206.26 more than allowed to him by the Court. This claim is contrary to the evidence and against Appellant's own written admission as shown in Exhibit F, wherein, it appears from said Exhibit in his own hand writing that the insurance paid by him was in the sum of $124.03. The record further discloses that demand was made upon the Appellant's bookkeeper to produce a check showing payment of any sum in excess of $124.03 (R. 148). He could not produce any such check. His only evidence was a self-paid statement issued by Mr. Arge in behalf of his own Insurance Company (R. 149). It should also be noted that the insurance policy had been cancelled

shortly after the grape sales and, therefore, the sum could not possibly exceed the amount found by the Court (R. 174).

POINTS IV and V

The Court found that "on or about the 28th day of June, 1952, the defendant took said truck into his own exclusive possession and appropriated the same to his own use." As pointed out in the statement of facts herein, the Appellant gained possession of the truck upon the ground that he was the owner thereof through his replevin action, and immediately after getting possession of the truck through the sheriff of Salt Lake County, he caused his action to be dismissed. Thereafter, without the knowledge or consent of his partner, Appellant sold the truck at the Salt Lake Auction for the sum of $1,800.00. The Salt Lake Auction is an institution used by dealers to buy cars at wholesale prices. The Court found at the time of the taking of the truck, the reasonable market value was $2,300.00. This value was based upon testimony by a qualified automobile salesman.

In 68 C.J.S., page 528, paragraph 88, dealing with a Misappropriation of Firm Property on the part of a partner, it is stated:

> "Where a partner collects or receives any property or funds which rightfully belong to the partnership, such property or funds inure to the benefit of the partnership. A partner may not use partnership property for individual profit or benefit, as discussed infra No. 99; and, if he

> employs firm funds or property for his personal advantage without the consent of the other partners, he is guilty of a misappropriation and will be compelled to account for the funds or for the value of the property appropriated as of the time of the misappropriation, and is chargeable with all the loss of detriment suffered by the firm from the diversion."

In *Kaufer vs. Rothman,* (N. J.) 131 A. 581, the partner made away with a number of furs belonging to the partnership. It was held that the partner who wrongfully appropriates partnership assets must account for their real value, not the sacrificed price for which he sold them.

In *Mills vs. Williams,* (Oregon) 223 P. 542, where action of defendant in taking over partnership property amounted to conversion of plaintiff's interest, defendant became liable to plaintiff for one half value of firm property as of time of conversion.

Likewise in *Wilson vs. Brown,* (Cal.) 273 P. 847, it was stated:

> "It was found in this case that defendants had wrongfully and maliciously appropriated property of the partnership, of which the lots represented by these "accounts receivable" were a part. Plaintiff was entitled, therefore, treating this as a conversion, to a judgment for the reasonable value of the lots so converted. Defendants cannot complain that the price for which they had sold them was not their reasonable value."

In *Lynn vs. Arehart,* (Mich.) 203 N.W. 834, it was held that a partner who sold 12,000 tile blocks he had taken after a fire, was chargeable with the market value thereof at the time of the taking.

POINT VI

The Court found that the claim in the sum of $150.00 for the accounting services rendered by Mr. Jones was not a partnership obligation. The Court was right in making this finding, as the services rendered by Mr. Jones are set forth in Exhibit 18. This Exhibit is a statement made up of the items claimed to have been paid by Mr. Arge in behalf of the partnership, and also items which he did not dispute have been paid by Pantages. The Exhibit was nothing more than a personal memorandum to be used by the Appellant and his attorneys in the trial of the case. The Court determined that the services of Mr. Jones, who by the way is also the bookkeeper and accountant of the Appellant, were rendered for the personal use of his employer.

CONCLUSION

There is a sharp conflict in the evidence on the various items contended to have been paid by each of the parties. The Trial Court has made findings on each item contended for by each of the parties and entered its judgment in accordance therewith.

Many items claimed by the Appellant in the trial, as having been paid by him have been abandoned in this

appeal. It is believed that the evidence and testimony that appears in the record clearly substantiates the award made by the Court, and that the appellant has been credited with all items that he was entitled to be credited, and that the judgment of the Court should be affirmed.

Respectfully submitted,

H. G. METOS,
Attorney for Respondent.