IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2012

CORAM: ATUGUBA, AG .CJ (PRESIDING)
ANSAH, J.S.C.
OWUSU (MS), J.S.C.
YEBOAH, J.S.C.
GBADEGBE, J.S.C.

CIVIL MOTION
No.J5/5/2012

26th APRIL,2012

THE REPUBLIC

-VRS-

HIGH COURT (COMMERCIAL DIVISION) ACCRA,
EX-PARTE;NII ARMAH OBLIE - - - APPLICANT

1. MARCELO NAVARRO BATAS - - - INTERESTED PARTIES
2. BALBINO BORINAGA JR,
3 NII ADAM ADDY

R U L I N G

ATUGUBA, J.S.C:

The applicant moves this court for "an Order of Cetiorari directed to the High Court, (Commercial Division) Accra, Coram: His Lordship, Mr. Justice George Atto Mills-Graves, to bring up into this Hon. Court to be quashed, the Proceedings, including the Rulings and Orders of the said High Court, dated the 19th day of October 2011, and the 31st day of October, 2011, in the Suit No. OCC.1/11, entitled: 1. Marcelo Navarro Batas, 2. Balbino Borinaga Jr. 3. Nii Adam Addy v. 1. Nii Armah Oblie 2. Osekan Resort Limited;"

The brief facts of the case are that the interested parties instituted an action in the High Court (Commercial Division), Accra against the applicant claiming

"i. A declaration that 1st and 2nd Plaintiffs own 90,000,000 shares each in 2nd Defendant Company whiles 3rd Plaintiff and 1st Defendant own 5,000,000 shares each in 2nd Defendant Company.

ii. A declaration that the Plaintiffs and 1st Defendant are Directors of 2nd Defendant Company.

iii. An order for 1st Defendant to account for his stewardship of 2nd Defendant from 27th September, 2010 to date.

iv. An order for the appointment of an interim management committee to take over the management of 2nd Defendant Company.

v. An order of injunction to restrain 1st Defendant, his agents, assigns, workers and servant from managing 2nd Defendant from the date of issuance of this Writ to date of final judgment.

vi. Cost inclusive of legal and administrative cost."

Subsequently the plaintiffs applied for interim injunction restraining the applicant (the 1st defendant) from managing the affairs of the 2nd defendant, and for the appointment of a manager and receiver.

In granting the application the trial judge G.A. Mills-Graves J ordered inter alia, "all proceeds that have accrued from the 2nd Defendant Company and which the 1st Defendant has kept solely in his personal account (different from that of the 2nd Defendant Bank Account) shall within 7 days from today be returned to the 2nd Defendant Bank Account. (Inclusive of *the sum of GH¢37,846.50 that stand in the name of 1st Defendant in a separate Bank.*"

For non compliance with this order the applicant was committed to prison for a term of 60 days. An application to set aside this committal was dismissed by the trial judge. Hence this application before this court.

The obvious question arising in this application is whether the order of the trial court for the return of the moneys from the applicant's personal account to the company's account is an order for the payment of money and therefore upon the authority of the *Republic v High Court (Fast Track Division), Accra, Ex parte PPE Ltd & Paul Juric (Unique Trust Financial Services Limited Interested Party)* (2007-2008) SCGLR 188 is not enforceable by committal, by reason of 0.43 r.12(1) of the High Court (Civil Procedure) Rules, 2004, C.l.47.

There is no doubt that this order involves money, therefore the residue of the question is whether payment is involved. The Oxford Advanced Learner's Dictionary 7th edition defines payment inter alia as money either paid or awaited to be paid.

In *Latilla v Commissioners of Inland Revenue* (1943) 1 AllER 265 H.L the House of Lords (as it then was) had to construe the words "*become payable*" under s.18(1) of the Finance Act, 1936(C.34) which provided as follows:

> "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, *income becomes payable* to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows:-
>
> (1) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts."

The House of Lords held as follows:

"The appellant correctly argues that "any such transfer" in subsect. (1) means any "transfer of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, *income becomes payable*" to the company.

He then contends- and this is the pinch of the case – that *trade profits made by a partnership cannot be said to be income a share of which "becomes payable" to one of the partners. One partner, it is said, is not a creditor of the partnership: the share of partnership profits to which the Latjohn Trust Ltd. became entitled could not, in this view, be described as income which "became payable" to the company*.
The answer to this argument is to be found in the powerful judgment of LAWRENCE, J., and again in a passage from the judgment of LORD GREENE, M.R., which I would respectfully adopt as expressing with the greatest clearness and precision the true view of the application of sect. 18 to the facts of this case. Speaking for the Court of Appeal, LORD GREENE, M.R., declared his disagreement with the appellant's arguments, and continued at p. 217:

"The share of the profits of the partnership to which the company is entitled is that share which comes to it in accordance with the terms of the partnership. *The company is entitled to call upon its partner to do whatever may be necessary, for example, by signing a cheque on the banking account of the partnership to enable the company to obtain its share*. In the partnership accounts the company's undrawn share of profits would appear as a debt owing to the company. *If the profits were under the control of the other partner, the company could by appropriate proceedings compel him to pay over its share. If this is not income "payable" to the company, we do not know what it is.*"(e.s)

At 268 Lord Porter also said:

"*The main argument*, however, presented to your Lordships *was centered upon the words "payable to*." It was said that *those words necessitated the existence of a payer and a payee and that income could not become "payable" out of partnership funds to a company which was a member of the partnership. A partner, it was contended, was already the owner, amongst other things, of his share of the partnership profits and could no more pay himself out of those profits of his own business*.

No doubt it is true to say that *an individual cannot pay himself, if pay be used in its strict sense*. But no question of an individual's ability to do so arises here. *The only question is whether income can be said to be payable to a partner out of the partnership assets*. I think it can. "*Payable" is not a term of art*, and, though a partner cannot sue the partnership or the partners individually in order to recover partnership assets, *yet, as LORD GREENE, M.R., points out, he has at his disposal*

means whereby he can ensure that his share reaches his hands. In such circumstances it seems to me that the word "payable" is appropriately used and accurately conveys the process by which the income finds its way into the pocket of the individual. It would, I think, *not inaccurately be described as having been paid to him out of the partnership funds*." (e.s)

It is therefore clear that upon strict construction of O. 43 r. 12(1) and the application of the decision of this court in the *Ex parte PPE Ltd &Paul Juric,* case the order of the High Court in this case being one for the payment of money the procedure of committal would not lie. But as was said by Sowah JSC in *Mekkaoui v Minister of Internal Affairs* (1981) GLR 664 S.C at 708 "*Every enactment is designed to effect a purpose .. .. ..*
You operate a law for the purpose of achieving the objectives of that law….." (e.s)

The question then is whether O.43 r. 12(1) of C.l.47 can be said to contemplate and comprehend a case such as this, as one of its purposes. As Taylor JSC in the *Mekkaoui* case said at 719, "…I believe it is now trite law and there is no need to cite any authority to support it, *that in all statutes, the legislature or the lawgiver is presumed to have legislated with reference to the existing state of the law.* I think the decision of Lord Parker C.J. in *Fisher v Bell (*1961) lQ394 is an admirable illustration of this elementary principle."

The omission of the committal procedure in respect of a judgment or order for the payment of money under O.43 r. 12(1) of C.I.47 is carried over from a similar omission from O.42 r.7 of the old High Court (Civil Procedure Rules) 1954, L.N. 140 A. However the remedy of committal was left to O.69 of L.N. 140 A.

The evils of imprisonment for monetary debt can be harvested from the procedure of summons to show cause under O.69 of L.N. 140A, the old High Court (Civil Procedure)

Rules. In his pioneering book Civil Procedure in Ghana, at 99 E.D. Kom (of much lamented memory) has this to say:

> "*Summons to show cause, Order* 69
>
> A judgment creditor can apply in writing to the registrar of the court where he obtained judgment, *to issue summons against the judgment debtor*, calling upon him to appear before the court on a day specified in the summons, and *show cause why he should not be committed into prison for refusing or neglecting to pay the judgment debt*.
>
> If after service of the summons on him he fails to appear before the court bench warrant will be issued for his arrest. If he appears in obedience to the summons or is arrested and brought to court, *the judgment creditor has to prove one of the following before the order can be made*.
>
> (a) that the judgment debtor has means to pay but has refused or neglected to pay the same;
>
> (b) that *with intent to defraud or delay his creditors he has made a gift, delivery or transfer of his property or removed it from the jurisdiction* of the court where the judgment was obtained;
>
> *(c)* that *the debt or liability* in respect of which the judgment was obtained *was contracted, or incurred by him by fraud or breach of trust;*
>
> (d) that *forebearance of the debt was obtained by him by fraud*;
>
> (e) that the debt or liability was *willfully or recklessly contracted, or incurred by him without his having at the same time a reasonable expectation of being able to pay or discharge it.*
>
> If the judgment *creditor proves his case* to the satisfaction of the court *the judgment debtor will be committed into prison*…… "

It can be seen that the summons to show cause procedure was a perilous one which endangered personal liberty even though in reality the contemnor just could not pay up the judgment debt. It is clear however that if upon the mere exercise of assessment of the evidence led, it could be held that he had the means to pay, he would go to jail for his perceived default, only for the real truth to be discovered afterwards, see *Asumadu-Sakyi*

II v. Owusu (1981) GLR 201 C.A. Even some of the grounds listed by Kom as justifying an order of committal to prison on a summons to show cause had nothing to do with the applicant's means to pay. No wonder this summons to show cause procedure which was only a more elaborate committal procedure, has also, been banned by omission from C.147.

By contrast, upon the facts of this case the applicant's liability was the ministerial act of issuing a cheque to lodge the moneys covered by the order of the High Court into the proper account (the company's account). In these circumstances the situation of the applicant is akin to that of a person in possession of a chattel who has been ordered to surrender or release it to another person. From another angle his situation is akin to a person who merely is ordered to effect the reversal of a monetary credit, wrongly made to his bank account, in favour of the appropriate account to which it should have been credited, see *Barclays Bank (D.C.O) v. Heward-Mills* (1964) GLR 332 S.C.
What is involved in this case is a mere specific banking act. It is not an open-ended order for the payment of money. Indeed the act is to be performed within 7 days and no extension of this time limit has been sought. This makes it impossible for other alternative procedures like garnishee proceedings to be pursued, so as to preserve the applicant's personal liberty. In any case we do not conceive committal under O.43 r.12(1) to be one of absolute liability and the trial judge indeed did not treat it as such.

It is settled law, as stated by Mensa Boison J.A., delivering the judgment of the Court of Appeal in *Catheline v. Akufo-Addo* (1984-86)1 GLR 96 C.A, at 104 that "It is a settled rule, where the words admit, that *an enactment should be construed such that the mischief it seeks to cure is remedied, but no more*."

There is no conceivable mischief arising from the application of the committal process to the applicant, on the facts of this case, even though technically the order is for the

payment of money. If he nonetheless lends himself to it that will be ***volenti non fit injuria***

For all these reasons though the order of the trial court involves the payment of money it is a payment of money only in the strict and technical sense but not the kind of judgment or order for the payment of money within the contemplated scope of exemption from committal relief under O.43 r.12(1).

Therefore even though the applicant's counsel has displayed ingenuity in contending that O.43 r.12(1) does cover this case, this court must repel destructive brilliance ***ut floreat justitia.***

The application is therefore dismissed.

(SGD) W. A. ATUGUBA
ACTING CHIEF JUSTICE

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
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