

SUPREME COURT OF NIGERIA
 30TH MAY, 1995. SC. 51/1989
CORAM:- S.M.A. BELGORE, I.L. KUTIGI,
E.G. OGWUEGBU, S.U. ONU, A.I. IGUH, JJSC.

MR. S.A. EHIMUA PLAINTIFF/APPELLANT

AND

NATIONAL OIL & CHEMICAL
 MARKETING OIL CO. LTD. DEFENDANT/RESPONDENT

APPEALS - *Finding of fact - Of trial court - That is not supported by credible evidence - Whether to be interfered with.*

EVIDENCE - *Exhibits - That do not support the appellant's claim - Trial court erred in relying on them.*

PLEADINGS - *Departure - Where plaintiffs claim derogated from his pleadings - The claim should be rejected.*

FACTS

The plaintiff/appellant filed an action before the High Court Ekpoma against the defendant/respondent. Plaintiffs claim is based on his allegation that there was an oral agreement between him and the defendant for payment of 2 kobo commission per litre of petroleum products sold through plaintiff's self-built service station. The commission was for the use of the plaintiffs said station, equipment and materials. The commission in question is different from that usually deducted at source by all service stations including those built by the defendant.

The trial court found for the plaintiff and awarded the sum of N210,483.80 in his favour. Defendant's appeal to the Court of Appeal was allowed by dismissing the claim. Plaintiff has now appealed to the Supreme Court raising a single issue.

ISSUE FOR DETERMINATION:

"Whether the Court of Appeal was right in setting aside the whole awards of the trial court, having regard to the trial court's evaluation of the evidence in relation to the pleading."

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**)
Pleadings - Departure

1. In the first place I think the Court of Appeal must be right when it found that the

plaintiff's claims derogate from his pleadings. Claim (b) in para. 19(b) of the Amended Statement of Claim for reasonable rent for use of station, equipment and materials is clearly not within the contemplation of the contract pleaded in para. 3 above. The question of hiring or renting appellant's premises materials or equipment was never part of the alleged agreement. It therefore ought to have been rejected and I think it was properly rejected by the Court of Appeal. (p. 1235 G)

Exhibits that do not support the claim

2. As for Claim (a) for the 2 kobo per litre commission, I agree with the Court of Appeal that there is nothing in the exhibits tendered by the appellant (including Exhibit C) which supported appellant's claim. A careful examination of all the exhibits above clearly shows that none of them has anything to do with any agreement for the payment of 2 kobo per litre extra commission claimed by the appellant. The trial court certainly misdirected itself when it relied on those exhibits to find for the appellant. (p. 1235 H)

Appeals-finding of fact

3. Although it is an established principle that a Court of Appeal should not easily disturb a finding of fact of a trial judge, it is however settled law that such a finding of fact or inference drawn from it may be questioned in certain circumstances including as herein, where the finding of fact is not reasonably justified or supported by the credible evidence given at the trial. (p. 1236 D)

REPRESENTATION

O.O. Akhidenor with H. Nwander for the appellant
Chief Ben Nwazojie SAN with Emma Okafor for the respondent

CASES REFERRED TO

Balogun v. Akanji (1988)1 NWLR 301
Obe v. Executive Secretary Family Planning Council of Nigeria (1975) 3 SC.1.
Barau v. B.O.C.E. (1982) 10 SC. 48.
Balogun v. Agboola (1974) 1 ALL NLR (Pt. 2) 66).
Shell-BP Petroleum Development Co. of Nigeria Ltd v. H.H. Pere Cole (1978) 3 S.C. 183 at 194
Omoregie v. Idugiemwanyi (1985)2 N.W.L.R. (Pt. 5)41

LEAD JUDGMENT BY KUTIGI JSC

The plaintiffs claims as contained in para, 19 of his Amended Statement of Claim read thus -

"19.(a) The sum of N186,483.80 being the value of sales commission of 9,324,190 litres of various types of petroleum products sold or marketed by

the plaintiff for the defendant at the plaintiff's Self built service or Filling Station otherwise called "Ekpoma Service Station" or "Ekpoma S/S" situated along Benin/Auchi Road, Ekpoma, between December, 1976 to December, 1980 at the rate of 2k per litre being rent commission for the use of the said station equipments and materials.

(b) Reasonable rent for the use of the said station, equipments and materials for the period of January, 1981 to December, 1982.

OR (c) 2k per litre as agreed commission for the use of the said Filling Station Equipments and Materials upon sales of Petroleum Products made by the plaintiff for the period January, 1981 to December, 1982. The originals (if the sales Analysis - showing detailed particulars of the plaintiff transactions with the defendant for this period are in the possession of the defendant. The copies in the plaintiff's possession having been lost in an accident or death involving one of the plaintiff's workers in the said station. The defendant is hereby given notice to produce the said originals and other particulars in their possession relevant to the said transactions.

OR ALTERNATIVELY

The sum of N292,000.00 or any part thereof being reasonable rent for the use by the defendant of the plaintiff's said Service Station at Ekpoma for the period, December, 1976 to December, 1982 inclusive at the rate of N4,000.00 per month or any part thereof."

After the filing and exchange of pleadings the case proceeded to trial. The plaintiff testified and called one other witness while the defendant called two witnesses. At the end of the trial the learned trial Judge in his judgment found for the plaintiff when he said on page 131 of the record thus -

"I therefore hold that the plaintiff has established his claim for the sum of N186,483.80 as commission. I also hold that the plaintiff has established his claim and entitlement for claim for payment of reasonable rental fees for the use of his own petrol station for the sale of the defendant's petroleum products, from 1981 to 1982 and I assess and award to the plaintiff, as a reasonable rental fee for the use of his petrol station for the exclusive sale of the defendant's products from 1981 to 1982 a monthly rental fee of one thousand Naira. I therefore enter judgment against the defendant in the sum of N210,483.80."

Aggrieved by the judgment of the High Court the defendant appealed to the Court of Appeal, Benin City, The Court of Appeal in its judgment delivered on the 11th day of July 1988 allowed the appeal set aside the judgment of the High Court and dismissed plaintiff's claims with costs.

Dissatisfied with the judgment of the Court of Appeal the plaintiff has appealed to this Court. The parties filed and exchanged briefs of argument which were adopted and relied upon at the hearing.

Mr. Akhidenor learned counsel for the plaintiff (hereinafter referred to as the appellant) submitted in his brief only one issue as arising for determination in this appeal. It reads-

"Whether the Court of Appeal was right in setting aside the whole awards of the trial court having regard to the trial court's evaluation of the evi-

dence in relation to the pleading.”

He said the learned trial Judge was right when he made his finding of fact that there was an oral agreement between the parties to pay 2 kobo per litre for the petroleum products of the defendant (hereinafter called the respondent) sold by the appellant. He said the type of contract pleaded and upon which evidence was led required no writing as there was no dispute that Mr. Omenai (D.W.1) was an agent of the respondent. There was also no dispute that the discount of 73 kobo deductible at source applied to the appellant. He said the trial court's finding of facts must not be disturbed because they were supported by evidence and that question of trade usage did not arise in the case. He referred to the case of *Balogun & ors v. Akanji* (1988) 1 NWLR (Pt. 70) 301. It was also submitted that although the learned trial Judge relied in part on Exhibit C to find for the appellant, the appellant did not claim the amount contained in Exhibit C and as such Exhibit C could not have formed the foundation of the appellant's claim of 2 kobo per litre commission which the court found payable to the appellant. He said the dismissal of appellant's case by the Court of Appeal was wrong having regard to the findings of the trial court which were not perverse. We were urged to allow the appeal.

Responding, Chief Nwazojie learned counsel for the respondent submitted that the appellant did not prove the existence of any oral contract by which the respondent agreed to pay to the appellant 2 kobo commission for every litre of petroleum product purchased from the respondent by the appellant. He referred to the evidence of the appellant on pages 50 & 51 of the record which he said proved nothing. He also referred to the evidence of Mr. Omenai (D.W.1) on pages 69,70 & 77. He said the witness who was consistent throughout maintained that he never entered into any agreement on behalf of the respondent to pay the appellant the commission of 2 kobo per litre as alleged and that even if such an agreement were to be made it could only have been made by the respondent's sales manager for the whole country in Lagos. It was also submitted that the appellant tendered Exhibits A - A4, B, C, D, E, F, G, H & J to support his claims and that although none of the exhibits supported the 2 kobo per litre commission, the learned trial Judge relied heavily on Exhibit C and found for the appellant. He referred to pages 120-122 of the record and submitted that the learned trial Judge wrongly evaluated the evidence and misconstrued Exhibit C which was merely an internal memorandum of the respondent and the contents of which did not establish a contract between the parties. He referred to the case of *Ajayi-Obe v. Executive Secretary Family Planning Council of Nigeria* (1975) 3 SC. 1. It was further submitted that the Court of Appeal was right in setting aside the judgment of the High Court which was perverse and did not flow from the evidence adduced at the trial. He cited in support -

Shell BP. Dev.Co. Nigeria Ltd

v.

H. H. Pere Cole. The Pere of Kumbowei & Ors
(1978) 3 SC. 183 at 194;
Soleh Boneh (Overseas) Nigeria. Ltd

v.

Ayodele & Anor (1989) 1 NSCC Vol. 20 page 283 at 291:

B (1989)1 NWLR (Pt.99) 549 at 560.

The Court was asked to dismiss the appeal.

The starting point is probably to state the fact that the simple issue submitted for determination above was also the main issue before the Court of Appeal as it related to the trial High Court which made the awards in the first place. The submissions are not therefore entirely new. In coming to the conclusion that there was an agreement between the parties to pay the 2 kobo per litre commission. The learned trial Judge amongst others, made the following finding of fact on page 130 thus -

C

“That the defendant acting through the 1st D.W orally contracted with the plaintiff to pay to the plaintiff 2 kobo sales commission per litre of petroleum products sold by the plaintiff for the defendant on the basis’ of dealer owned outlet.”

D

He had before then on pages 120-121 stated as follows -

“On a careful examination of the evidence adduced before me in this case, the main issue in controversy between the parties is whether the defendant through its agents came into an agreement with the plaintiff to pay a commission of 2 kobo per litre of the defendants' petroleum products sold by the plaintiff for the defendants. On this vital issue the plaintiff testified that Mr Omenai (1st D.W.) who is a servant or agent of the defendant contracted with him The 1st and 2nd D.Ws denied these facts in their evidence. In support of his oral evidence on this point the plaintiff tendered Exhibits B, C, D, F, G, and H which were admitted in evidence without objection.....Both in their heading and contents Exhibits B, C, D, F, G and H deal with plaintiff’s claim from the defendant of sales commission or payment for the use of the materials in the plaintiff’s petrol station, Ekpoma Exhibit C is the internal memo of the defendant prepared and signed by its servant namely, Mr. S. O. Eneh and it is headed “Ekpoma S/S-Dealer Owned Dealer’s Claim for Refund.”

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G

From Exhibit C therefore it cannot be true as stated by the 1st D.W. in his evidence that dealers who operate the dealer-owned outlets are only entitled to the 0.73k discount at source, like the company owned outlet dealers. I believe the plaintiff when he testified that in addition to the 0.73 kobo discount deductible at source.....

H
dealers who operate the dealers-owned outlets
.....are entitled to extra commission.....

The Court of Appeal was therefore right when it found that it was by

examination of documentary exhibits referred to above and in particular Exhibit C. that the learned trial Judge found that the appellant had established his claim for the payment of the extra 2 kobo per litre commission.

The question now is - was there any evidence in support of the Judge's finding of fact above?

The Court of Appeal carefully examined these exhibits including Exh. B C, the relevant paragraphs of the pleadings and in particular para. 3 of the Amended Statement of Claim as well as the testimonies of witnesses and came to this conclusion on page 305 of the record -

"The finding that the appellants were liable to pay for the commission is erroneous and cannot be allowed to stand. It is a finding not based on a proper appraisal of the totality of the evidence adduced before the trial court. It is also a finding of fact not properly pleaded and evidenced. The complaint is well made out."

I have myself examined the Exhibits B, C, D, F, G, & H, appellant's evidence, the testimonies of both D.Ws 1 & 2 at the trial and para. 3 of the Amended Statement of Claim which reads-

"3. On or about December, 1976, the defendant took over the plaintiffs self-built Service Station mentioned in paragraph 1 above, as a Dealer Owned/Outlet after earlier inspection, negotiations, consultations and agreement reached between the defendant's representative, one Omenai who was then the retail manager of the Defendant for the East and the plaintiff himself at Ekpoma, with the following particulars:

(a) That the plaintiff shall market for the defendant and the defendant shall supply plaintiff with petroleum products at a discount of 0.73k per litre by way of commission which is the same price as offered to dealer of Stations built by the defendant itself and at his own expense.

(b) That the defendant shall use plaintiff's premise, buildings, equipments, paid Servants/Station attendants, dispensing pumps, generator, ground floor of a storey building as sales room, concrete for court, service station, service pump, service compressor, etc., to sell petroleum products through the plaintiff.

(c) That the defendant shall pay to the plaintiff 2 kobo per litre for any petroleum product sold or marketed for the defendant by the plaintiff as commission for the use of the said Station Equipments and materials"

In the first place I think the Court of Appeal must be right when it found that the plaintiff's claims derogate from his pleadings. Claim (b) in para. 19(b) of the Amended Statement of Claim for reasonable rent for use of station, equipments and materials is clearly not within the contemplation of the contract pleaded in para. 3 above. The question of hiring or renting appellant's premises materials or equipments was never part of the alleged agreement. It therefore ought to have been rejected and I think it was properly rejected by the Court of Appeal. As for Claim (a) for the 2 kobo per litre commission, I agree with the Court of Appeal that there is nothing in the exhibits tendered by the appellant (including Exhibit C) which supported appellant's claim. A break-down of the exhibits show -

(i) Exhibits A-A4 - returns of sales of 7/1/77
9/1/78, 3/1/80 and 3/1/81 respectively;

B (ii) Exhibit B -an acknowledgement of receipt of a letter headed "*Ekpoma Filling Station, Dealer owned Outlets Commission*";
(iii) Exhibit C- Dealer's Claim for Refund (of purchased equipments);
(iv) Exhibit D-Claim for Materials
(v) Exhibit E-Quantitative and Qualitative Targets for 1980;

C (vi) Exhibits F, G & H - correspondence between the parties about the claim for payment of 2 kobo per litre commission, subject-matter of this suit.

A careful examination of all the exhibits above clearly' shows that none of them has anything to do with any agreement for the payment of 2 kobo per litre extra commission claimed by the appellant. The trial court certainly misdirected itself when it relied on those exhibits to find for the appellant. Although it is an established principle that a Court of Appeal should not easily disturb a finding of fact of a trial Judge, it is however settled law that such a finding of fact or inference drawn from it may be questioned in certain circumstances including as herein, where the finding of fact is not reasonably justified or supported by the credible evidence given at the trial (see for example *Barau v. B.O .C.E. (1982). 10 SC 48. Balogun & ors. V. Agboola (1974) 1 All NLR (Pt. 2) 66*).

E I therefore resolve the single issue herein against the appellant and hold that the Court of Appeal was right in setting aside the awards made by the High Court.

F The appeal therefore fails and it is hereby dismissed. The respondents are awarded costs of one thousand (N1,000.00) naira only.

BELGORE JSC

G I read in advance the judgment of my learned brother, Kutigi, J.S.C. and I agree with him that the appeal lacks merit and ought to be dismissed. I also for the same reasons in the judgment dismiss this appeal and make the same consequential orders.

OGWUEGBU JSC

H I had a preview of the judgment just delivered by my learned brother Kutigi, J.S.C. I agree with his reasoning and conclusion.

The only issue for determination in the appeal identified by the appellant is whether the court below was right in setting aside the whole awards made

by the learned trial Judge having regard to the trial court's evaluation of the evidence in relation to the pleading.

It was submitted by the learned counsel for the appellant that the Court of Appeal should not have interfered with the findings of the trial court in respect of the claim in paragraph 19(a) of the statement of claim. Paragraph 19(a) of the amended statement of claim reads:

"19(a) The sum of N 186,483.80 being the value of sales commission on 9,324,190 litres of various types of petroleum products sold or marketed by the plaintiff for the defendant at the plaintiff's self built service or Filling Station otherwise called "Ekpoma S/S" situated along Benin-Auchi Express Road, Ekpoma, between December, 1976 to December 1980 at the rate of 2k per litre being rent commission for the use of the said station equipment, and materials. "

On the above claim, the learned trial Judge, after evaluating the evidence held:

"Therefore, the current claim before this court is the further amended statement of claim, as the statement of claim is no more the claim before me. Having found that the defendant through 1st D.W. contracted orally to pay 2k sales commission to the plaintiff for every litre of petroleum products of the defendant sold by the plaintiff as stated by the plaintiff in his evidence which I believe, the next question that falls for determination is as to the quantity of petroleum products the plaintiff sold for the defendant between 1976 and 1980, I therefore hold that the plaintiff has established his claim for the sum of N186,483.80 as commission."

The court below while dismissing the plaintiff's claim in its entirety after allowing the appeal of the defendant said:

As stated earlier, the learned trial Judge relied on Exhibit "C" in accepting the respondent's story. But is there anything in Exhibit "C" to Justify this attitude? I have myself read the document; I can find nothing in it to support respondent's claim ...

"In my view, on the totality of the evidence adduced at the trial, the only reasonable inference that can be drawn is that the respondent was an independent contractor or dealer buying petroleum products at a discount from the appellant for sale at his petrol station Added to all the these is the fact that no document was tendered in support of the claim nor was evidence led of the custom of the trade that owner dealers of petrol stations were paid extra commission for the use by them of their stations. In the appeal on hand, I am satisfied that the learned trial Judge failed to properly evaluate and appraise the evidence before him. Had he done so he would have unhesitatingly rejected respondent's claim to the extra commission of 2k per litre of petroleum products sold by him at his station."

I am in complete agreement with the above conclusion reached by the court below. The appellant failed to establish the said oral agreement to pay him 2k per litre of petroleum products purchased from the respondent. In addition, Exhibit "C" which the learned trial Judge relied on in coming to his conclusion,

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was not concerned with any agreement to pay 2k per litre of petroleum products of the respondent sold by the appellant. Its contents cannot create a contract between the appellant and the respondent. In fact, it is an internal memo which was not addressed to the appellant and was not even meant to come to his knowledge. It was not even for his consumption. One can safely say that he procured it through questionable means.

B This court in many of its decisions had emphasised the rule that it will not ordinarily interfere with the findings of facts made by a trial Judge but where there is sufficient evidence as in this case and the trial Judge failed to evaluate it and make correct findings on the issue, an appellate court is in as much a good position as the trial court to deal with the facts and make proper findings. This is precisely what the court below had done in this case. It would have been otherwise if it is a matter where so much turned on credibility or reliability of witnesses. **C** In such a case, the proper order which the court below would have made was that of a retrial. See *Shell-BP Petroleum Development Co. of Nigeria Ltd v. H H. Pere Cole & ors. (1978) 3 SC 183 at 194.*

In appeal against findings of fact by a trial court, an appellate court must:
D (a) attach the greatest weight to the opinion of the trial Judge who has the duty to see and indeed has seen and heard the witnesses and,
(b) not to disturb the findings of fact made by him except where such findings are unsound.

See *Omeregie v. Idugiemwanye (1985) 2 NWLR (Pt. 5) 41; Commissioner For Works and Housing v. Lababedi & or. (1977) 11-12 SC 15 and Chief E Ebba v. Chief Ogoto & or. (1984) 4 SC 84; (1984) 1 SCNLR 372 or (1984) 1 All NLR 372.*

The findings of fact made by the learned trial Judge in this case are quite unsound if not perverse. The court below was right in disturbing the said findings.

F It is for these reasons and for the more detailed reasons ably stated by my learned brother Kutigi J.S.C. that I too would dismiss this appeal. I abide by the orders as to costs contained in the lead judgment of my brother Kutigi, J.S.C.

ONU JSC

G Having had the advantage of a preview of the judgment of my learned brother Kutigi, J.S.C. just delivered, I agree with his reasoning and conclusion that this appeal lacks merit and therefore fails.

H I accordingly dismiss the appeal and make the same consequential orders inclusive of those as to costs as contained in the lead judgment.

IGUH JSC

I have had the privilege of reading, in draft, the lead judgment just delivered by my learned brother, Kutigi, J.S.C. and I am in full agreement with

him that this appeal is without substance and should be dismissed.

The main issue upon which this appeal revolves is whether the Court of Appeal was right in setting aside the awards of the trial court in favour of the appellant having regard to the pleadings and the evidence before the court. The claim of the appellant is that there was an oral contract pleaded and relied upon by him whereby the respondent was to pay him 2 kobo commission for every B litre of petroleum purchased by him from the respondent. This contention was accepted by the trial court as a result of which judgment was entered for the appellant.

It is noteworthy that the learned trial Judge relied on Exhibit C in coming to his conclusion that the respondent agreed with the appellant in 1976 on the said payment of 2 kobo commission per litre on all the petroleum products purchased by the appellant. Said the learned trial Judge:- C

"From Exhibit 'C' therefore, it cannot be true as stated by the 1st D.W. in his evidence that dealers who operate the dealer-owned outlets are only entitled to the 0.73 kobo discount at source, like the company-owned outlet dealers. I also believe the plaintiff when he stated in his evidence that in 1976 the 1st D. W., D for and on behalf of the defendant, agreed to pay to him as dealer-owner of his own petrol station at Ekpoma. 2 kobo commission on petroleum products sold for the defendant in the plaintiff's petrol station. I disbelieve the 1st and 2nd D.W.S when they testified that no such agreement was entered into between the plaintiff and the defendant acting through the 1st D.W.... (Italics supplied for emphasis) E

The Court of Appeal in reversing the judgment of the trial court criticized the same per Ogundare, J.C.A. as he then was as follows:-

"As stated earlier, the learned trial Judge relied on Exhibit 'C' in accepting the respondent's story. But is there anything in Exhibit 'C' to justify this attitude? I have myself read the document: I can find nothing in it to support F respondent's claim. Exhibit 'C' was a recommendation by an official of the appellant that compensation be paid to the respondent for the cost of 5 underground tanks and 5 dispensing pumps and cost of their installation which the respondent had earlier borne. The fact that a copy of this internal memorandum was given by the official to the respondent showed the degree of 'sympathy' the G official had for him. And the fact that the respondent was prepared to accept the sum of N65,200.00 recommended in the document belied the claim of the respondent to an agreement to pay him 2k per litre commission for the use of his equipments. True enough, it was stated in Exhibit 'C' thus: Since the company policy on dealer-owned outlet is clear, it should be applied in this case'. H What the policy was, was not disclosed in evidence. And the onus was on the respondent to prove that the policy was the payment of 2k per litre extra commission to owner dealer. With respect to the learned trial Judge, if he had properly considered exhibit 'C', he would have found that the respondent's claim could not have been true. In my view on the totality of the evidence adduced at the trial, the only reasonable inference that can be drawn is that the respondent was an

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independent contractor or dealer buying petroleum products at a discount from the appellant for sale at his petrol station. In the appeal on hand, I am satisfied that the learned trial Judge failed to properly evaluate and appraise the evidence before him. Had he done so, he would have unhesitatingly rejected respondent's claim to the extra commission of 2k per litre of petroleum products sold by him at his station."

B The law is settled that where a trial court fails to evaluate and appraise the evidence adduced before it or where such appraisal is perverse, the appellate court seised with the same materials is in as much a good position as the trial court to deal with such facts and make appropriate findings which the trial court should have reached on a proper evaluation of the evidence before it. See Shell BP Petroleum Dev. Co. Nig. Ltd. V. H.H. Pere Cole & others (1978) 3 SC 183 at
C 194, Soleh Boneh Overseas (Nig.) Ltd. v. Ayodele & Another (1989)1 NSCC vol. 20 283 at 291: (1989) 1 NWLR (Pt.99) 549 at 560: Okpiri v. Jonah (1961) All NLR 102 at 104-105: (1961) 1 SCNLR 174 etc. In the present case, the learned trial Judge was clearly in error when he based his acceptance of the
D appellant's version of the transaction from Exhibit C. I have myself studied Exhibit C very carefully and can find nothing in it to support the appellant's claim. In my view, the court below was perfectly right in setting aside the judgment of the learned trial Judge which seems to me perverse in the sense that the findings do not appear to flow from the evidence before the court. See too Benmax v. Austin Motor Co. Ltd, (1955) A.C. 370, Maja v. Stocco (1968) 1 All NLR 141 at 149 and Woluchem v. Gudi (1981) 5 SC 291 at 295-296, It is for the above and the more
E elaborate reasons contained in the lead judgment that I too, dismiss this appeal. I abide by the consequential orders including the order as to costs therein made.

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