Privy Council Appeal No. 71 *of* 1913.

Karmali Abdulla Allarakhia - - - *Appellant,*

v.

Vora Karimji Jiwanji and others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH NOVEMBER 1914.

Present at the Hearing.

LORD DUNEDIN. SIR JOHN EDGE.
LORD SHAW. MR. AMEER ALI.

[*Delivered by* LORD DUNEDIN.]

This action arises out of transactions connected with a venture in brown sugar entered into by the first and second Respondents. The second Respondent is now bankrupt and the third Respondent is his official assignee: and neither of them defended the action or took part in the proceedings under appeal.

The first Respondent, Karimji, and second Respondent, Rashid, were both merchants carrying on business in Mauritius and had for some time been rivals in the sugar trade.

Rashid had all along also had a Bombay house, and Karim was in the act of setting one up, but it was not at the date to be presently mentioned yet open.

The Appellant, Karmali, is a merchant carrying on business in Bombay and Hongkong.

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Karim and Rashid resolved to have a joint speculation in brown sugar to be shipped from Mauritius to Hongkong. The terms of the arrangement they made between themselves were on 25th July 1906 embodied in a stamped agreement. The document is too long to quote, but may be summarised thus—It begins with a preamble that the parties "for " the purpose of doing business in partnership " in brown sugar from Mauritius to Hong- " kong agree to act as follows." Then follow the terms. Purchases were to be made "jointly" at Mauritius. These purchases were to be made by both firms after consultation with each other, and after taking advice from the Bombay houses. No limit as to purchase is imposed on either firm; but as soon as either firm buys, that firm is to give a delivery order on the Dock warehouse for half the quantity of the parcel to the other firm. When sufficient sugar to load a ship has been purchased, then a ship is after consultation to be chartered, and loaded with the purchased sugar and despatched to Hongkong. Invoices of the sugar, made out separately as half and half, were to be sent respectively to each of the Bombay firms. At the same time Rashid was to draw bills to the value of the sugar on his Bombay house, and Karim on his Bombay house when it came to be opened. But until that time came he was to draw bills on Karmali. If the banks at Mauritius refused to discount the bills on the Rashid or Karim house, the Bombay firms were to be informed by wire, in which case it was said that Karmali would come to the rescue by interposing credit according to arrangement made with him. On the ship arriving at Hongkong the arrangements as to sale of the sugar were to be carried through by

the Bombay houses. Account sales were to come from Hongkong made up separately half and half to each. Then the invoices were to be added together and the surplus or deficit on the entire transaction was to be divided equally. Chartering was to be done in either one or both names; but all commissions were to be equally divided. In the event of the Hongkong market being bad and there being an opportunity of a profit by reselling at Mauritius, this was to be done after permission got from Bombay; and such profit on all sales was to be equally divided. The agreement was to remain good for a year from date of signing. There is then an addendum to the agreement written and signed by the Plaintiff, in which he binds himself to come to the assistance of the partners if the Mauritius banks refuse to discount the bills drawn by the Mauritius firms of the two defendants on their own Bombay firms respectively.

Following on this agreement a venture was commenced, and the terms of the agreement were literally carried out, except in one particular. That is to say, sugar was bought, about 36,000 bags by Karim, and about 4,000 by Rashid. Delivery orders were then given by each to each for half of the sugar purchased by him, and the sugar so divided on shipment was consigned to the Hongkong firm of the Plaintiff. The one particular in which the agreement was not literally complied with was that the bills were not drawn by Rashid and Karim at Mauritius on Rashid and Karim in the first instance and then, on refusal of the banks to discount, recourse had to the assistance of the Plaintiff; but they were at once drawn on and accepted by the Plaintiffs' firm at Bombay. The bills were drawn by Rashid and Karim respectively for sums approximately representing the value of the sugar shipped

upon the separate invoices of each, *i.e.*, about half and half—an exact half being unattainable on account of the packages in which the sugar was put up.

The sugar arrived at Hongkong, and was sold by the Plaintiff to whom it was consigned. The venture, however, turned out a failure instead of a success; the prices realised not being sufficient to give a profit after payment of the price of the sugar, the freight, and other expenses.

The Plaintiff accordingly raised this action, which is truly an action of accounting against both Rashid and Karim. Now, when the bills drawn by the two Defendants had become due, and were payable to the banks who held them, Karim had retired the bills of which he was the drawer, but Rashid, who had by this time become insolvent, had not retired the bills of which he was the drawer, with the result that the Plaintiff whose name was on these bills as acceptor had to retire them. This necessarily brought out a considerable balance on the whole transaction as due to the Plaintiff. The bankrupt respondent Rashid and his official assignee did not oppose judgment being entered against them; but the solvent partner Karim opposed judgment upon the ground that he had paid all sums due on bills signed by himself, and that he was not liable in respect of any monies raised on bills to which he was no party.

The case depended before Russell, J., in the High Court at Bombay, who after trial found in favour of the Plaintiff. The material ground of his judgment may be effectively summarised by quoting two of his findings on the issues which he incorporated with his judgment, which were as follows:—

> "I find (1) There was a partnership between first and second Defendants' firms . . . (4) The Plaintiff

> paid and advanced moneys on the Hundis (Bills) for and on account and for the credit of the said partnership."

The Court of Appeal reversed that judgment. The gist of their judgment may be taken from the concluding paragraph thereof, which is as follows :—

> "Treating the question as purely a question of liability between the parties to the bills of exchange it is manifest that the Plaintiff cannot succeed in charging the first Defendant with liability on bills of the second Defendant, and having regard to what appears to us to be the correct construction of the agreement between the parties, we cannot hold that there is any collateral agreement by which one shipper agreed to be liable for the default of the other in not taking up the bills of exchange drawn by him on the Plaintiff."

Their Lordships are of opinion that it is erroneous to treat the question as purely a question of liability on the bills. In other words, they think the issue proposed by the learned trial Judge to himself was right. The case of the Adansonia Fibre Co., 9 Ch. 635, seems to have been much pressed on the Court by the learned Pleader. But the very first sentence of the judgment of James, L.J., shows that in that case the only question was whether in a winding up proof could be made on the bills alone; and that all questions of ultimate liability were left undecided.

No one doubts that there was here a partnership. It is stated to be a partnership in the agreement, and it amply falls within the definition of a partnership given by the Indian Contract Act, which rules parties in this case. It is, however, a partnership of a limited character, and consequently liability to be enforced against one partner when there is no document of debt which on its face binds him, can only be justified if it was shown that what

he did was within the operations natural to the partnership and for the partnership.

Their Lordships think that the law on these matters is accurately stated in the well-known judgment of Lord Ellenborough in *Gouthwaite* v. *Duckworth* (12 East 421). In saying "the law," it would perhaps be more accurate to say, a statement of the criterion which is to be applied to the particular facts of each case in order to see whether the transaction is or is not a partnership transaction. In that case it was sought to make Duckworth liable for goods purchased by Brown and Powell, and Lord Ellenborough says this: "There seems also to have been "some contrivance in this case to keep out of "general view the interest which Duckworth "had in the goods; the other two defendants "were sent into the market to purchase the "goods in which he was to have a moiety; "and though they were not authorised, he says, "to purchase on the joint account of the three, "yet if all agree to share in goods to be pur-"chased, and in consequence of that agreement "one of them go into the market and make "the purchase, it is the same for this purpose "as if all the names had been announced to "the seller, and therefore all are liable for the "value of them." He distinguishes the case of *Saville* v. *Robertson* (4 Term Rep. 720) thus: "The case of *Saville* v. *Robertson* does indeed "approach very near to this; but the distinction "between the cases is that there each party "bought his separate parcel of goods which "were afterwards to be mixed in the common "adventure on board the ship, and till that "admixture the partnership in the goods did "not arise." And Bayley, J., after describing *Saville* v. *Robertson* in the same way says: "but "here as soon as the goods were purchased the

" interest of the three attached in them at the " same instant by virtue of the previous agree- " ment."

Mr. George Joseph Bell, in his celebrated Commentaries on the Principles of Mercantile Jurisprudence, after stating that the law of Scotland is the same as the law of England in this matter, quotes the judgment of Lord Ellenborough as correctly laying down the law, citing, *inter alia*, a case of Kinnear, on the same lines as Gouthwaite, which was affirmed in the House of Lords in 1765, and the whole matter is comprehensively expressed in his Principles, sec. 395, in words which their Lordships think accurately give the result of the cases both old and modern. " Where goods are purchased " or money raised for the joint adventure, and " the dealing though ostensibly by an individual " is truly and substantially a dealing of the " joint adventure, the adventurers are liable as " partners. But there is no such responsibility " for goods, &c. purchased on the credit of an " individual adventurer previously to the con- " tract though afterwards brought into stock as " his contribution. . . ."

It may be and often is a difficult matter to say on which side of the line thus indicated the facts of a particular case fall, and cases will be found illustrating both results. To the cases already cited may be added the case of *Heap* v. *Dobson*, 15 C.B., N.S. 460, while in the Scottish Courts may be taken as on the lines of Gouthwaite's case the case of *British Linen Co.* v. *Alexander*, 15 D. 277 (where the facts are strikingly similar to the present case), and on the lines of Saville and Heaps' cases, *White* v. *McIntyre*, 3 D. 334.

Their Lordships are aware that Lord Lindley, in his capacity as an author but not as a judge,

expressed some doubts as to whether the case of Goutwhaite could be supported. They are of opinion that, whether that doubt is sound or not, it is not a criticism on the criterion of law indicated by Lord Ellenborough and the other judges; but is only an indication that a different view might have been taken of the facts of that particular case.

Turning then to the present case, their Lordships have come to the conclusion that the judgment of the trial Judge was correct. The considerations which lead them to that result are as follows.

It is clear from the terms of the agreement that either of the two partners by the mere fact of purchase (after consultation as to price) could subject any sugar independently of the action of the other to becoming partnership sugar. A purchase of sugar therefore becomes a purchase for the partnership, and anyone who sold the sugar, or advanced money by which the sugar was bought, was crediting the partnership with goods or money. This is further accentuated by the provision as to possible resale in Mauritius itself. If either party in the case bought sugar, and then came to resell it in terms of that article, he could not refuse his coadventurer a share of the profit he made. These considerations make it impossible to say, as was said effectively in Saville's case or Heap's case, that the joint adventure only began when the goods were shipped, as it is clear that the joint adventure began as regards each parcel from the moment that parcel was bought. The learned Judges of the Court of Appeal are impressed with the view that the agreement is " elaborately drawn for the purpose of keeping " the interests of the two shippers distinct " . . . except in so far as a combination

" between them was desirable for the purpose " of securing joint shipment and a sale of the " sugar at Hongkong." Their Lordships cannot take this view. It ignores the fact that notwithstanding the separate shipment and consignation documents, the sugar was admittedly to be accounted for as partnership sugar. Supposing that the particular parcels consigned by one had in some way been deteriorated, either by perils of the sea, without insurance, or by the development of some intrinsic fault, it is perfectly clear that the other party would have had to bear his share of the loss resulting in the whole cargo. No doubt the anxious arrangements for shipping and consignation in separate names were peculiar. But the reason for them is amply explained by the fact that the parties desired secrecy, being afraid at Mauritius of the hostile action in breaking prices of a rival whose astuteness they deploringly acknowledged.

Moreover, it is clear not only that the facts as to the terms of a partnership in the sugar shipped are as have been stated, but that the Plaintiff knew the whole terms and conditions of the agreement. He knew, therefore, he was helping by advance of credit the partnership in its purchase of sugar. The learned Appeal Judges say that the Respondent Karim did not avail himself of the Plaintiff's credit. That that credit was not interposed in the precise way originally contemplated by the 4th article of the agreement is true. But that they did not in fact avail themselves of the Plaintiff's credit is obviously an error. The bills speak for themselves. When a drawer discounts an acceptance which acceptance is given at a time when the acceptor owes no money to the drawer, it is idle to say that the drawer does not avail himself of the acceptor's credit; and

if anything more was wanted it is to be found in the evidence of Karim himself, who admits in cross-examination, "For the purchase of all that "sugar neither I nor Rashid paid a rupee; it "was all paid for by Hundis accepted by the "Plaintiff."

Their Lordships will, therefore, humbly advise His Majesty that the Appeal should be allowed and the Judgment of the trial Judge restored: the Defendant Karim paying costs in the Courts below and before this Board.

Confidential.

KARMALI ABDULLA ALLARAKHIA

v.

VORA KARIMJI JIWANJI AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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