Privy Council Appeal No. 98 of 1917.

Hip Foong Hong - - - - - - *Appellants*

v

H. Neotia and Company - - - - *Respondents.*

FROM

HIS BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH JULY, 1918.

Present at the Hearing:

EARL LOREBURN.
LORD BUCKMASTER.
LORD DUNEDIN.

[*Delivered by* LORD BUCKMASTER.]

This is an appeal from an order of the Full Court of His Britannic Majesty's Supreme Court for China sitting at Shanghai, refusing the appellants' application for the new trial of an action heard by the Chief Judge Sir Havilland de Sausmarez on the 7th July, 1916, and decided in favour of the respondents.

An appeal was originally instituted against the judgment itself, but this was abandoned in favour of the attempt to obtain a new trial. The appellants were well advised in the course they thus took. The difficulties that beset the hearing of the action were not of a nature that could be better resolved before their Lordships than they were before the learned Judge who tried the case. No question of law whatever was involved in the issue; the conclusion depended upon the determination of the claims of contending witnesses and the balance of commercial probabilities, weighed with the knowledge of local habits and local manners.

The soundness of the judgment on the material originally before the learned Judge is therefore no longer in controversy; but, none the less, it is essential for the determination of this appeal that there should be some examination of the facts leading up to the dispute.

The appellants are a Chinese firm residing in Shanghai and dealing in opium. The respondents are a firm of British Indian opium merchants, with head offices in Calcutta and Bombay and a branch office in Shanghai. Between the 10th August, 1911, and the 14th February, 1912, contracts were entered into between the appellants and the respondents by which the respondents agreed to sell to the appellants 175 cases of opium in parcels deliverable four months after the date of the respective contracts.

In January 1912 the importation of opium into several of the provinces of China was prohibited, and the position alike for the Chinese dealers and for the Indian merchants became hazardous in the extreme. Had the strict rights under all the existing contracts been relied upon and enforced, the Chinese dealers would, in all probability, have been unable to meet their obligations and the merchants would have found themselves unable to recover payment for their delivered goods. In order to relieve the position two combinations were formed—one known as the "Foreign Opium Merchants' Combine," and the other as the "Chinese Opium Guild"—with the object of regulating the flow and distribution of opium so as to enable the contracts to be slowly and effectually liquidated. For this purpose agreements were come to between the Combine and the Guild by which the Combine should sell when opportunity offered, and that, so far as Bengal opium was concerned, one-half of the sales should be apportioned among the members of the Guild and one-half among the foreign merchants, such latter half being divided *pro ratâ* between bargain stock, *i.e.*, stock subject to contract and not delivered and the unsold stock.

This method of liquidation proceeded and, towards the end of 1914, the markets became more easy, and private deliveries capable of being carried into effect.

These circumstances need to be borne in mind in considering the conduct of the appellants and respondents in relation to the matter. So far as the appellants were concerned, they took some small deliveries of the opium in 1912, but they failed to take any substantial delivery throughout the whole of that year; and claims for interest were consequently made against them by the respondents. On the 17th February, 1913, the respondents made a return to the Opium Combine of their contracts, and included therein the whole of the balance of the appellants' contracts. In January 1914 the appellants asked for delivery of twenty chests, the respondents only objecting upon the ground that the quality asked for was of the poor quality, and was not equally distributed among the various classes of opium.

Nothing further took place till May of 1915, when the appellants asked for delivery of the balance of opium and were met with the refusal to deliver on the part of the respondents, based on the ground that the contracts had been cancelled in November 1912. The appellants, thereupon, sued

the respondents for damages for non-delivery of the opium, and to that action the respondents repeated their allegation that the contracts were no longer on foot, but had been duly cancelled.

This was the dispute that came before the learned Judge for trial, and he decided it in the respondents' favour. There were many circumstances in the case on each side that were difficult to explain, but the learned Judge accepted the statement of the respondents' representative—Ganesh Chandra Ghose—that the contracts had been cancelled by arrangements between the parties fortified by an entry against the original contract as it stood, signed by the appellants in the respondents' book, with the word "cancelled" written against it; and supported also by a statement that in the Chinese books the contracts were referred to with a note that they had been transferred to the respondents' firm.

There were two strong pieces of evidence against the respondents' contention—the first that in the statement made on the 17th February, 1913, by them to the Combine, the contracts had been referred to as existing contracts; and the other that when application was made for the deliveries in January 1914 no allegation that the contracts were cancelled was set up.

The learned Judge in no way minimised the gravity of these facts, and duly weighed them against the probabilities and the circumstances that he thought told against the plaintiffs' claim, and in the result dismissed the action.

An appeal against such a judgment would, indeed, have been difficult to support, and the application for a new trial was not based upon any complaint in connection with the original hearing, but upon the ground that further matter had been disclosed which showed that the defendants' case was so tainted with fraud and dishonesty that, in the interests of justice, the appellants were entitled to have the matter reheard. The material upon which this charge of fraud was framed in part consists of the affidavits of certain witnesses, one of whom had given evidence at the earlier trial; but chiefly of certain documents of which possession was secured by the issue of a search warrant against one Karanje, one of the respondents' witnesses, who was charged with perjury and absconded from the charge. It has been held that the search warrant was improperly issued, and though this fact has no bearing upon the merits of this appeal, their Lordships are constrained to express their disapprobation of the unlawful issue of search warrants, and the entrance into a man's house by such means for the purpose of obtaining access to his private documents. The documents that were seized in this manner were certain copies of bill books, the books relating to the sale of Bengal opium, and certain telegrams said to disclose a fraudulent and improper means of obtaining evidence on the respondents' behalf. The most important of these were the extracts from the bills copy books showing the accounts of the Bengal chests cleared, and the balance remaining of bargains

liquidated during the Combine. This is dated the 24th July, 1914, and it shows as an existing bargain the contract with the respondents for the 169 chests the balance undelivered of the original contracts. Against this 169 there is put an apportioned amount of the opium sold through the Combine, and the balance remaining is set out in another column.

It was alleged at the hearing that no other books existed beyond those disclosed bearing on this matter; and it is plain that this book was material and should have been produced. It must, however, be remembered that it added nothing beyond a repetition of the statements made on the 17th February, 1913 —a circumstance which, as has already been pointed out, the learned Judge had fully and duly weighed in arriving at his conclusion, and the production of this book discloses no new fact.

A telegram, however, dated the 19th July, 1915, from Calcutta to Shanghai contains a request to send to Calcutta the contracts, and this involved sending the books in which the originals were contained. This fact contradicted the evidence of Karanje, who swore that the book had gone to India in 1914; while, finally, another witness named Shirazi was shown by other documents to have been promised and paid 56,000 taels as a reward for giving evidence in favour of the respondents; and that Sun Fuh Pao, or as he was also called Chug Fok Pow, the compradore, had been promised 5 per cent. interest from the result of the litigation by the defendants. The assistant compradore Ching Chi Sen, who had given evidence at the trial, and one Saurastri, an employee of the defendant, also made affidavits—the first that he was directed to make the entry of transfer in the Chinese contract book in 1916, and was told to say that the contracts were cancelled in 1912; while Saurastri speaks to the contract book being sent back in July 1915. Saurastri's evidence does not carry the matter very much further. He had charge of the books, and he does not say that, when he sent the book, it did not contain the word "cancelled" against the contract, and he further states that the book was brought back in October 1915, and he gives no explanation of the undoubted fact that it was in Calcutta again when Ghose gave his evidence in February of 1916. The affidavit of the other witness cannot be trusted. A man who says one thing on oath at a trial, and contradicts it by his bare oath subsequently on an affidavit, cannot expect that much credence will be given to the latter assertion which proves that his former evidence was false. The witness who received the 56,000 taels proved nothing whatever at the trial. His evidence as recorded in the Judge's notes was totally valueless, and the Judge attaches no importance whatever to what he said.

Their Lordships regard with great disfavour the method of obtaining evidence which these documents disclose; but they are unable to find that, even if the purpose was dishonest—and

there is not sufficient material before them to decide that issue one way or the other—the dishonesty produced any result that had the least effect upon the mind of the learned Judge who heard the case. Of the two learned Judges who formed the full Court from which this appeal is brought, the one was the learned Judge who heard the case himself, and, at the conclusion of his Judgment, he makes the following statement:—

> "Given, for the moment, that the defendants' preparation of the case was improper, a charge in which it is unnecessary to say their legal advisers are not in the least involved, this does not substantially affect the judgment, which is not in itself impugned. The documentary evidence, which has been discovered and which was primarily relied on, does not carry the case far, and it is now bolstered up by unsatisfactory evidence, which will only become more unsatisfactory with the lapse of time and the increasing opportunity for contradiction. A second trial must in many ways be less satisfactory than the first."

and from this expression of opinion their Lordships are not prepared to dissent.

It is, however, urged on the appellants' behalf that the learned Judge's conclusion was due to a misapprehension on his part of a decision in the House of Lords of *Brown* v. *Dean* in 1910 A.C., p. 373. In that case it was stated, in the opinion of Lord Loreburn, that, when an application is made for a new trial on the ground of discovery of new evidence, "it must at least be such as is presumably to be believed, and, if believed, would be conclusive." But that case had nothing to do either with fraud or with surprise, as was, indeed, pointed out. It dealt merely with the claim for a new trial based on the ground that further evidence could be obtained that was not obtainable when the trial took place. Fraud or surprise or both are the ground of the application in the present case, and the learned Judges were in error in thinking that the authority in itself had any direct and present application to the matter they were considering. In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go further, and show that the evidence was of such a character that it would (so far as can be foreseen) have formed a determining factor in the result. Such considerations do not apply to questions of surprise, and still less to questions of fraud. A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail; but in the present case their Lordships are unable to say that such a case has been established. They think the judgment of the Supreme Court was in its conclusion correct. They have only to add that where a new trial is sought upon the ground of fraud,

procedure by motion and affidavit is not the most satisfactory and convenient method of determining the dispute. The fraud must be both alleged and proved ; and the better course in such a case is to take independent proceedings to set aside the judgment upon the ground of fraud, when the whole issue can be properly defined, fought out and determined, though a motion for a new trial is also an available weapon and in some cases may be more convenient.

In their opinion this appeal must fail, and should be dismissed with costs, and to this effect they will humbly advise His Majesty.

In the Privy Council.

HIP FOONG HONG

v.

H. NEOTIA AND COMPANY.

DELIVERED BY

LORD BUCKMASTER.

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1918.