

*Privy Council Appeal No. 119 of 1917.*

Maung Ba Dun and another . - - - - - *Appellants*

*v.*

The Moolla Rice Mill Company, Limited - - - - - *Respondents*

FROM

THE CHIEF COURT OF LOWER BURMA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 12TH MAY, 1919.

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*Present at the Hearing :*

VISCOUNT FINLAY.

LORD DUNEDIN.

LORD SHAW.

[*Delivered by* VISCOUNT FINLAY.]

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This action was brought in the Chief Court of Lower Burma by Maung Ba Dun and his wife, Ma Thet, against the Moolla Rice Mill Company to recover a balance said to be due in respect of the supply of paddy by the plaintiffs to the Company under an agreement between them.

The plaintiffs reside at Kyauktan and the Company carry on business at Rangoon. The case for the plaintiffs is that it was in May, 1911, arranged between them and the Company that they should supply to the Company in Rangoon paddy to be purchased by them as instructed by the Company, and that the Company should pay for the paddy at the current market rate prevailing in Rangoon at the date of delivery plus a commission of 2 per cent. ; but this last term as to commission was in contest between the parties, and is the subject of the first question on this appeal. The Company were to make advances to the plaintiffs to put them in funds to pay for the paddy as purchased.

Paddy was purchased and supplied to the Company under the agreement made in May. Disputes arose as to the amount due, and it was alleged by the plaintiffs that a settlement was arrived at early in July, 1911, one of the terms of which was that the plaintiffs should have an option to fix on any day during the period of the next three months the price of that day as the price to be paid for paddy which should have been delivered during that period. This alleged variation of the terms was contested by the Company, and is the second of the points to be decided on this appeal.

Another question on which the parties are at issue relates to the following items in the plaintiffs' claim for paddy supplied by them :—

25th August	..	..	..	2,949 baskets.
2nd September	..	..	..	8,099 „
3rd September	..	..	..	7,433 „
4th to 26th September	..	..	..	33,623 „

The Company had in its employment one Maung Po Su as head broker, who was remunerated by salary and commission. Po Su's wife, Ma May, was a sister of Maung Ba Dun, the first plaintiff. For the convenience of transaction of business under the agreement between the plaintiffs and the Company, Maung Po Su was by letters of the 5th and 6th June, 1911, constituted the plaintiffs' agent to see to the delivery of the paddy to the Company on its arrival at Rangoon, and to receive any money due from the Company for the plaintiffs.

The Company alleged that the paddy to which these items related had been supplied, not by the plaintiffs, but by Po Su and his wife, Ma May. The Chief Court, however, decided that this paddy had been supplied by the plaintiffs, and there is no appeal against this decision ; but a question arises with reference to payments alleged to have been made by the Company to Po Su in respect of this paddy. The Company claim that they are entitled to credit for these payments as against the plaintiffs' claim for the price. This is the third question falling to be decided on this appeal.

The case was tried by Robinson, J., who defined the main questions as being—

- (a) What were the terms on which the paddy was supplied to the Company according to the original agreement and according to the variation alleged by the plaintiffs ? and
- (b) Was the paddy comprised in the four items in August and September, 1911 (above mentioned in this judgment), supplied to the Company by the plaintiffs, and, if so, could the defendants claim credit for payments made to Po Su in respect thereof ?

Robinson, J., held that by one of the terms of the agreement of May, 1911, the plaintiffs were entitled to a commission of 2 per cent., but on this point he was reversed by the Court of Appeal.

Robinson, J., further held that under the subsequent variation made in July, 1911, the plaintiffs were entitled to an option giving them the right to fix the price for all paddy supplied on or after the 7th July up to the 13th September, and that by the exercise of this option the price had been fixed at Rs. 195 per hundred baskets for all such paddy. His finding on this point was varied by the Appeal Court, in which it was held that the option applied only to the paddy delivered between the 4th and the 9th July, 1911.

With regard to the paddy delivered in August and September, Robinson, J., held that the plaintiffs had not established that they were the vendors, and further held that if they were the vendors they would have to give credit for any sums paid in respect thereof to Po Su by the Company. The Appeal Court held that the plaintiffs were the vendors, but agreed with Robinson, J., in holding that credit must be given for any sums paid by the Company to Po Su in respect of this paddy.

This appeal has been brought by the plaintiffs, and there is no cross-appeal. The questions that now arise for decision are three :—

- I. Are the plaintiffs entitled to 2 per cent. commission ?
- II. To what paddy is the rate of Rs. 195 per hundred baskets fixed under the option applicable ?
- III. Is the Company entitled to credit for payments to Po Su in respect of the paddy delivered from the 25th August to the 26th September, 1911 ?

I. The claim for 2 per cent. commission was allowed by Robinson, J. He pointed out in his judgment (p. 304) that if this brokerage had been agreed to it was strange that there was no entry in the Company's books at any time of a credit of brokerage on the plaintiffs' account. He proceeds :—

“ It is said that the 2 per cent. was to be credited at the end when accounts were made up, and this, of course, might have been done. The matter is not easy of solution, but after considering all the evidence and the conduct of the parties and their mutual relations and advantages, I am of opinion that it was agreed that 2 per cent. brokerage would be given. Defendants and Po Su were anxious to get paddy. I am satisfied that they were anxious to get plaintiff to undertake the business. It was expected that he would be able to supply large quantities, and he had to be induced by favourable terms to undertake the business.”

The conclusion of the learned Judge was that the defendants undertook to pay the brokerage of 2 per cent. to cover the plaintiffs' expenses and payments to local brokers.

The Appeal Court differed on this point from the Judge of first instance. They say in the course of their judgment :—

“ The defendant Company paid their head broker, Po Su, Rs. 2·8 per cent. per hundred baskets commission, and in their daily books they have credited the plaintiff with the paddy at the market rate of the day, and immediately below those entries they have credited Po Su with this Rs. 2·8, and those entries were made before any disputes arose. If there was an arrangement that the mill would pay the plaintiff Rs. 2, this commission would have come out of the Rs. 2·8 payable to Po Su, and the plaintiff would have been credited with Rs. 2 and Po Su debited with Rs. 2 in the entries in the mill accounts.”

On this ground the Appeal Court arrived at the conclusion that the plaintiff had not made out his claim for this 2 per cent. commission.

There is nothing inherently improbable about the plaintiff's statement that the Company agreed to this 2 per cent. commission. Although the plaintiff obviously bought the paddy as principal and sold it as principal to the Company, the arrangement was a very special one. Though he was in no sense an agent of the Company, yet, having regard to the Company's anxiety to get the plaintiff to undertake the business of collecting this paddy for supply to them, they might well have agreed to give him the extra inducement which this would supply to undertake the business. The Trial Judge believed the evidence of the plaintiffs, and was unfavourably impressed, in some points at least, by the evidence on behalf of the Company, and the question is purely one of fact. The only point against the plaintiffs is the absence of any entries in the defendants' books as to this 2 per cent. commission. But this may be due to the action of Po Su, from whose commission their commission would form a deduction: and the defendants did not call Po Su, although he was still associated with them as their broker. Their Lordships therefore on this point think it safer to abide by the conclusion arrived at by the Trial Judge.

II. The Appeal Court is in agreement with Robinson, J., in holding that an arrangement was made in July, 1911, giving an option to the plaintiffs as to fixing the price, but they differ as to the extent of its application. On this point their Lordships agree with the conclusion arrived at by the Trial Judge, which appears to them to be supported by the evidence and by all the probabilities of the case.

The plaintiffs had been informed that the defendants were crediting them with two pounds per basket less than the amount of paddy delivered, and that they were allowing as the market rate a price less than other mills allowed by Rs. 3 or Rs. 4 per hundred baskets. The first plaintiff wrote a letter of complaint to Maung Po Su on the 24th June, 1911, and again on the 29th June, and on the 6th July he telegraphed, "Don't let paddy be measured or don't fix price if measured until I come." The second plaintiff, Ma Thet, went to Rangoon, and returned bringing a letter of the 7th July from Po Su, in which it was said that the plaintiff's letter had been shown to Hadjee Abdullah, and that his request would be complied with. On the 9th July the first plaintiff himself came to Rangoon and had an interview with Hadjee Abdullah and Po Su at which, as he stated, a settlement was arrived at, one term of which was that the option as to the price should be given. This is denied by Hadjee Abdullah. As to this conflict of evidence, the learned Trial Judge said in the course of his judgment:—

"Plaintiff's version is clearly supported by the probabilities of the case and by the correspondence. He had sold elsewhere, and defendants might well have been willing to meet him. His evidence and that of his

wife was obviously sincere, while Hadjee Abdullah's impressed me most unfavourably. His sole idea seemed to be to express ignorance and to depose to as little as he could. I feel convinced that he has not spoken the truth about the claim to godown rents and insurance, and the strong impression left on my mind by the evidence was that there was almost certainly good ground for plaintiff's complaint of their treatment of him in the matter of rates and measurements. I am satisfied that, however unusual a three months' option may be, plaintiff was given the option claimed. He exercised it, and is entitled to be paid at the rate of Rs. 195 for the period to which the option extends, and thereafter at the market rate prevailing on the day of delivery."

The conclusion of the learned Judge on this point is strengthened by the fact that Po Su, who, as the learned Judge stated, was present at the interview, was not called by the Company, although at the time of the trial he was, and for all that appears still is, in the employment of the Company.

By letter of the 12th September, 1911, the plaintiff instructed Po Su as follows :—

"I think it is now time to fix at the current price the paddy belonging to me which had previously been measured and taken over at the Thute's mill without fixing the price. One's mind cannot be certain regarding prices of paddy. There is anxiety about the price falling afterwards. So please go to the Thute's office and fix the price at the current rate for the paddy which has been already measured and taken over."

On the 14th September Po Su wrote to the plaintiff in reply saying that "yesterday" (*i.e.*, on the 13th) he asked Mr. Hadjee Abdullah to settle for the paddy stored according to the plaintiff's request. The letter went on to say :—

"The paddy market ruling in the creek yesterday was at Rs. 195 per hundred baskets, so the settlement was mutually closed at the said rate."

These letters make it quite clear what the nature of the option was, and that it was exercised on the 13th September. The option was to take on any day during the three months the market price of that day as that which was to be the price of the paddy to which the option applied. As the first plaintiff said in his evidence at page 30 of the Record, line 27 :—

"I could not select any day after it had passed, but only on a day I could select the rate of that day."

The option was exercised on the 13th September, and Rs. 195, the rate of that day, became the price.

The Appeal Court differed from the Trial Judge on this part of the case only as to what was the paddy to which the option was to be applicable, and varied the judgment by declaring that it applied only to paddy which was delivered after the 5th July and up to the 9th July inclusive. The Appeal Court, in arriving at this conclusion, say that they relied upon the evidence of Ma Thet, from which they say, "It would appear that the arrangement come to on the 9th July related only to the paddy which was then at the mill, that is to say, paddy delivered after the 5th July up to the 9th July, which apparently

would be about 14,000 baskets." This appears to their Lordships to be a misconception of Ma Thet's evidence. The passage occurs at the foot of page 36 of the Record, and is as follows :—

"They" (that is, the assistant manager at the mill and Po Su) "told Ba Dun that if he did not agree to the lower rates he could keep the paddy at the mill without doing anything with it, and that he could select any day within the next three months to be paid for all his paddy at the mill at the rate that prevailed on that day."

The evidence of Ma Thet appears to their Lordships to be in entire accordance with the evidence given by her husband, the first plaintiff. At page 25 of the Record he says :—

"We agreed that I was to get the market rate I fixed, and that was to be the rate for all supplies during the three months. This was in July, and the three months referred to were July, August and September. I was at liberty to fix any day in those three months,"

and he gave evidence to the same effect as reported at page 30, line 11 to line 28.

It appears to their Lordships that the Trial Judge was right on this point, and that there was no ground for the variation made in the Appeal Court by confining the option to the paddy delivered from the 5th to the 9th July. Such a limitation seems unreasonable in itself, and is not supported by the evidence.

III. The only remaining question is whether the Company, as against the price of the paddy supplied by Ma May in August and September, are entitled to credit for the payments which they made to Po Su, their head broker. It is admitted that as regards all other paddy supplied by Ma May during the period to which the suit relates, it was supplied by her as agent for or partner with the plaintiffs. The Company, however, resisted the plaintiffs' claim in respect of these lots of paddy on the ground that they were sent to them by Ma May, not on account of the plaintiffs but on account of herself and her husband, Po Su. The Trial Judge held that the plaintiffs had failed to establish that the paddy was supplied on their account. The Appeal Court, on the other hand, held that the plaintiffs had established that they were the vendors of this paddy. But both the Trial Judge and the Appeal Court held that, even if the paddy did belong to the plaintiff, the Company were entitled to be given credit for the sums paid in respect of this paddy to Po Su. The point is rather assumed than argued in the judgments, and is not without difficulty. The Counsel for the appellant in this *ex parte* appeal rested his argument entirely on section 108 of the Indian Contract Act. This has, in their Lordships' judgment, no application, as Po Su never had possession of these goods with the consent of the plaintiffs. The extent of his agency was that he should see to the delivery of goods sold by the plaintiffs to the Company on their arrival at Rangoon, and should receive the price for the plaintiffs. Had Po Su been an agent for sale, it would have been a case where section 108 might have applied. But the title of the defendants to the paddy in no way flowed from Po Su. That depends on the original contract with the plaintiffs.

It may be that objection might have been raised to the allowance of these payments as against the plaintiffs, on the ground that they were made to Po Su on his own account as alleged principal, and therefore could not be treated as payments to the plaintiffs. This point is not adverted to in either of the judgments in the Courts below. Its decision would involve questions of importance and difficulty the solution of which might to some extent depend upon considerations of fact. Under these circumstances their Lordships are not prepared to overrule the conclusion arrived at in both Courts below that these payments should be allowed in account as against the plaintiffs.

Their Lordships will humbly advise His Majesty that the order of the Chief Court, Appellate Side, of the 20th August, 1915, should be varied in paragraph 2 by striking out the words "between the 5th and the 9th of July, 1911," and substituting for them the following: "between the 5th July and the 12th September, 1911," and in paragraph 4 by striking out the word "not" and inserting the words "at the rate of 2 per cent." after the word "commission." The appellants should have the costs of this appeal. There should be no costs of the appeal to the Appellate Side of the Chief Court.

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In the Privy Council.

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MAUNG BA DUN AND ANOTHER

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THE MOOLLA RICE MILL COMPANY, LIMITED.

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DELIVERED BY VISCOUNT FINLAY.

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