Privy Council Appeal No. 110 *of* 1926.

Khushaldas Gokaldas and others - - - - - - *Appellants*

v.

Chimanlal Kalidas and others - - - - - - *Respondents*

Same - - - - - - - - - - *Appellants*

v.

Same - - - - - - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH NOVEMBER, 1927.

Present at the Hearing:

VISCOUNT SUMNER.
LORD ATKINSON.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* VISCOUNT SUMNER.]

It is with a sense of satisfaction that it is not always possible to feel that the Board has come to a conclusion in this case.

The appeals are brought by special leave of His Majesty in Council granted some time ago. Down to last Friday, when this case was called on, the opinion of the Board was sought to all appearances upon a large number of questions which were said to involve, and probably did involve, questions of some importance, because they concerned the construction of a running contract between the plaintiffs and the defendants, a contract which is quite probably similar to many others between other parties.

From the commencement of the argument, however, the points involved in the appeals were dropped in the order of their importance, until at last the only point left, which is really capable of much discussion, involves a sum of about Rs. 1,500 only, and turns upon the question, whether the High Court made a slip in stating that the second suit was brought in time instead of saying that, as regards the first year for which the claim was made, it was a few weeks out of time.

The cause of action arises between agents to a cotton spinning company, who managed its affairs and are its secretaries and treasurers, and the plaintiffs, who, for consideration which it is not necessary to enquire into, were given under an agreement a share in the commission earned by the defendants and payable to them by the Company. The fact that they managed the Company and paid themselves by making entries in the books, does not in the least affect the question. It was on their sales that the Company was bound to pay the defendants, and out of the commission so payable the defendants bound themselves to make payments to the plaintiffs. The agreement, which is Exhibit 60, refers to "the commission payable to us under Clause 7 of the memorandum and Clause 34 of the Articles of the Company." When one refers to the terms of this agreement with the Company and the amended Articles, it appears that their commission was earned at fixed rates upon the weight of yarn and cloth manufactured and sold varying with the quality. It is said, therefore, that the commission which the defendants earned and which the plaintiffs were entitled to share was quite irrespective of the profit on working, which the Company might earn or not earn, and is ascertainable the moment it could be ascertained what quantity of goods of the various kinds had been manufactured and sold, for then it could be quantified by a simple calculation upon that footing. There is, however, a provision in the Articles which regulates the rate of the defendants' commission as against the Company, which qualifies this. Article 34 contains a schedule which sets out the terms of the agreement, and paragraph 4 is the paragraph in question. It says:—

> "But if in any year the nett income of the Company happens to be less than 6 per cent. on the paid-up capital of the shareholders, then in that year the agents shall give up an amount up to one-third share of their commission in order to make up that much amount in that year. But in no case shall they give more amount than one-third share of their commission in order to make up that amount. The account in respect of the commission of the agents shall be calculated at the end of the month and shall be credited to their account."

On the true construction of that paragraph their Lordships think that, although the agents might be entitled to credit themselves in the books month by month with the amount of commission earned by them, that would necessarily be a provisional credit, which cannot become definite and final until it has been ascertained whether the nett income of the Company is less than 6 per cent. on the paid-up capital of the shareholders or not.

There is no evidence to show on what materials or what date that could be ascertained at the earliest. There is no ground for thinking that the circumstances could be ascertained on the last day of the calendar year, and as no discussion arose below on the point and the course of business eventually was to take that ascertainment as happening when the Company held its general meeting and passed its account and not before, their Lordships think that upon this construction no sum was payable by the defendants to the plaintiffs, so that a cause of action could arise for non-payment until that outstanding matter had been decided at the ensuing annual general meeting and what had hitherto been provisional had become certain. On that ground, therefore, the plea of limitation, which has been raised with regard to all the years dealt with in the two actions, fails except for a point which relates only to the first year in the second action, the year 1918. In that year, according to the copy of the notice sent out for the general meeting, which is in the record, the meeting was summoned to take place in the month of May. The month of June, 1922, was that in which the second action was commenced, and accordingly it is said that the action is by a month or so too late, because there is the announcement of the date of the annual general meeting, and three years from that would have expired shortly before the writ was issued in the second action.

It is also suggested that there is error on the part of the High Court, who failed to notice this date and gave judgment, as they should not have done, to that extent in favour of the defendants.

The facts as to that are short. The matter did not arise for mention in the judgment of the first Court. In the High Court there is a distinct statement by the Judges that in both actions the writs were issued in time, and this was said with the document in question before them. What cause is there for supposing that they were wrong in that ? It is said there was no evidence to the contrary, and the evidence, such as it is, of the summons to the meeting is exhibited. If, however, the meeting was not actually held on that day or the resolution was not passed and the meeting was not concluded in that day, although there is no record of it in the proceedings, then there was material or there might have been material before the High Court which would justify their conclusion. Their Lordships are not obliged to allow these appeals because no one has been able to point out what was the actual admission or evidence which was before the High Court on the subject. That there was some admission or some such evidence, which justified them, is a reasonable assumption, because, first of all, if there was any slip, it was the duty of the defendants to have called the attention of the Court to it, so that it might be corrected. Again, it was in their interest to have drawn attention to it when they applied for leave to appeal to His Majesty in Council, as they did some time afterwards in most voluminous and exhaustive terms, but there is no mention of this point there.

and when, lastly, a petition was sent to this country with instructions to apply for special leave to appeal, this point was not mentioned at all either one way or the other, and it was only by the diligence of the Counsel who appeared that this discrepancy was observed and naturally made legitimate use of on the application. The Board are much obliged to Sir George Lowndes for giving them this candid information. The inference that their Lordships draw is this: It was known, for some reason which is not now before the Board, that the High Court had the material before it which was required, and therefore that its decision upon this point was right. The amount involved would only have been about Rs. 1,500, and if that alone had been brought before their Lordships when special leave to appeal was asked for, the leave certainly would not have been given. The other points there mentioned have now disappeared. Again, with a candour for which their Lordships are much obliged to Counsel, the contentions that there had been an offer only but no concluded contract, and that the respondents (plaintiffs) had never given the help that they contracted to give, which was a condition precedent to their right to be paid, were abandoned at the outset, and another and a new point that the defendants had never signed this document was also abandoned. Thus the case was brought down to the argument on limitation, and that again has been brought down to the year 1918. In their Lordships' opinion even that point vanishes.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed with costs.

In the Privy Council.

KHUSHALDAS GOKALDAS AND OTHERS

v.

CHIMANLAL KALIDAS AND OTHERS.

SAME

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY VISCOUNT SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1927.