

Liladhar Nemchand - - - - - *Appellant*

v.

Rawji Jugjiwan - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH FEBRUARY, 1935.

Present at the Hearing:—

LORD THANKERTON.

LORD ALNESS.

SIR SHADI LAL.

[*Delivered by* LORD ALNESS.]

This appeal is taken from a final judgment or order of the High Court of Judicature at Bombay, dated the 5th April, 1932, which in effect reverses a judgment or order of that Court in its ordinary original civil jurisdiction, dated the 9th October, 1931. The defendant in the suit in which these orders were pronounced, who is the present appellant, is a share broker in Bombay. The plaintiff in the suit, who is the present respondent, was a client of his.

The principal question submitted for the decision of the Board—a question of fact—is whether a sale for the settlement of April, 1920, and a purchase for the settlement of May, 1920, of 500 shares of the Simplex Mills, Ltd. (hereinafter referred to as “Simplex shares”), and certain resultant transactions, all of which were effected by the appellant, were transactions for which the respondent was liable to the appellant.

The first Court held that the respondent was liable; the Appeal Court held that he was not.

On the 1st December, 1922, the respondent instituted the present suit against the appellant for the market value of nine shares of four mill companies in Bombay, which were said to have been handed by the respondent to the appellant, on or

about the 16th May, 1920, for sale. The appellant, in his written statement, averred that, on the 20th June, 1920, these shares were handed over to him in security of the respondent's indebtedness in respect of certain share dealings with him, and he also counter-claimed for certain sums alleged to be due to him by the respondent. The appellant claimed the right to retain the shares till he was paid the debt due to him, or to sell them in satisfaction of his claim against the respondent.

In the suit an order was made, by consent, referring to the Commissioner to take an account of the dealings between the parties from the 1st January, 1920, to the 31st October, 1920, and to ascertain and report what sum was due by the one to the other on the 16th May, 1920, and the 20th June, 1920. The appellant duly lodged his account before the Commissioner, Mr. Wadia, and to these objections were lodged by the respondent. On the 23rd March, 1929, the Commissioner reported. He found that there was due by the respondent to the appellant Rs. 8162-3-0 on the 16th May, 1920, Rs. 18587-3-0 on the 20th June, 1920, Rs. 24209-11-0 on the 31st October, 1920. The transactions relating to the Simplex shares referred to *supra* were included in the accounts considered by the Commissioner.

The respondent filed objections to the report of the Commissioner, whereupon the case came before Mr. Justice Baker for decision. In the result, on the 12th December, 1930, he set aside the report of Mr. Wadia, and remitted the case for consideration to another Commissioner, Mr. Dadachanji, who had, in the meantime, succeeded the first Commissioner. On the 29th June, 1931, Mr. Dadachanji reported. He found that Rs. 2849-11-0 was due by the respondent to the appellant on the 16th May, 1920, Rs. 3375-5-0 due by the appellant to the respondent on the 20th June, 1920, and Rs. 2247-3-0 due by the respondent to the appellant on the 31st October, 1920. The difference between the results arrived at by the two Commissioners is due in large measure to the fact that the second Commissioner eliminated from the accounts certain dealings in respect of the 500 Simplex shares referred to.

The appellant filed exceptions to the second report, which were heard by Mr. Justice Kania. On the 9th October, 1931, he gave judgment, setting aside the report, allowing all the appellant's exceptions, and restoring the report of the first Commissioner. The respondent appealed against the judgment of Kania J., on the points decided against him, and, on the 5th April, 1932, the Appeal Court upheld the findings of the second Commissioner regarding the Simplex shares. Both Courts, it may be added, also dealt with a certain question of surcharge, which is not, however, before the Board in this appeal.

The principal question for determination is whether the respondent is under liability to the appellant in respect of the contract relating to the Simplex shares.

The respondent deponed that the contract note relating to these shares was originally drawn in his favour: that he requested the appellant, in so far as the Simplex shares were concerned, to delete his name from the note, and to substitute for it the name of one Halai: that the appellant duly did this: and that a fresh contract note relating to the Simplex shares was made out in Halai's name, and sent to him by the appellant. The appellant, in his evidence, admitted these statements. A copy of the contract note, showing the deletion referred to, is before the Board. The appellant, nevertheless, maintained that the transactions relating to the Simplex shares were entered into by him, not for Halai, but for the plaintiff, and that the latter is liable in respect of them.

The appellant's counsel frankly admitted that the *onus* rests on him of showing that, despite the altered terms of the contract note, the respondent remained liable to him in respect of the transactions in Simplex shares. The question before the Board therefore resolves itself into this—whether the appellant has discharged that *onus*. Counsel for the appellant advanced certain arguments, leading, so he contended, to the conclusion that the *onus* resting upon him had been discharged. Their Lordships have carefully considered the contentions urged on behalf of the appellant, but they regard these contentions as quite insufficient to yield the inference desired by him. They find themselves in complete agreement with the judgment of Beaumont, C. J., and, in particular, with the passage at pp. 184-5, where his Lordship says:—

“ Indeed I agree with most of the reasonings and the criticism on the accounts in the judgment of Mr. Justice Kania, but I am unable to agree with the conclusion at which he arrived because it seems to me that he has not directed his mind to the real difficulty in the defendant's way upon which the learned Commissioner Mr. Dadachanji based his decision. The question on this appeal is whether the plaintiff is liable in respect of dealings in 500 Simplex shares. If he is liable it must be on a contract and the defendant must show the contract. Now, where is the contract on which the defendant says that the plaintiff is liable in respect of those Simplex shares? Ex. D is a contract note of the defendant addressed to the plaintiff in which he originally included amongst other dealings a Badla transaction in respect of 500 Simplex shares. They were to be sold for the April Vaid, and bought for the May Vaid. According to the defendant's own evidence, the plaintiff saw him and told him that that transaction should be in Halai's name, and accordingly the defendant struck out of this contract all reference to the 500 Simplex shares, and according to his own evidence he made out a new contract in respect of these shares with Halai. Well now, the question before the Court being whether the contract in respect of the 500 Simplex shares was made with the plaintiff or Halai, when I find that originally it was proposed to be made with the plaintiff, but that at his request it was altered and the contract was made with Halai, I should require very strong evidence to show that notwithstanding that alteration the plaintiff was to remain liable on the contract.”

That evidence, in their Lordships' opinion, is not forthcoming, and accordingly the judgment of the Appeal Court on the principal question in the case must stand.

The appellant, however, contends that the judgment of the Appeal Court falls to be rectified in respect of the sum found due to him by the respondent. The Appeal Court found due by the respondent to the appellant:—Rs. 7099-11-0 at the 16th May, 1920, Rs. 874-11-0 at the 20th June, 1920, Rs. 6497-3-0 at the 31st October, 1920. Now the appellant's accounts from the 21st June to the 31st October, 1920, are accepted both by the Judges and by the Commissioners; and they show for that period a loss of Rs. 5622-8-0, incurred by the respondent. Included in that period there is shown:—(a) In the July account, a loss of Rs. 3000 on 100 Simplex shares; (b) in the August account, a profit of Rs. 8717-8-0 on 100 Simplex shares—in other words, a profit balance of Rs. 5717-8-0. It is clear that the dealings in regard to 70 out of the 100 shares referred to are further dealings arising out of the original contract. In their Lordships' opinion these dealings fall to be eliminated from the account, just as the dealings arising out of the contract down to the June account have already been eliminated.

Now, if the dealings in 70 of the 100 shares are to be eliminated from the account, then seventh-tenths of Rs. 5717-8-0, *i.e.*, Rs. 4002-4-0 falls to be added to the debit balance of Rs. 6497-3-0 found by the Appeal Court to be due by the respondent to the appellant on the 31st October, 1920. The order pronounced by the Appeal Court falls to be corrected to that extent, and should total Rs. 10499-7-0. Subject to that alteration upon the order, their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent will have the costs of the appeal.

In the Privy Council.

LILADHAR NEMCHAND

vs.

RAWJI JUGGIWAN.

DELIVERED BY LORD ALNESS.

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