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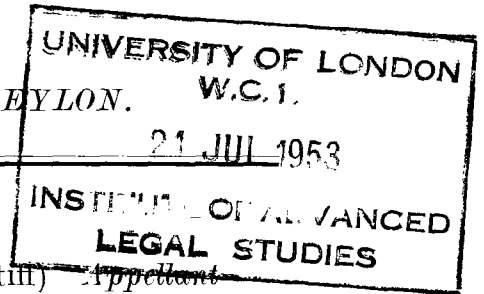
14, 1952

No. 19 of 1951.

31434

# In the Privy Council.

ON APPEAL  
FROM THE SUPREME COURT OF CEYLON.



BETWEEN

MOHAMED AKBAR ABDUL SATHAR (Plaintiff) ~~Appellant~~

AND

1. W. L. BOGTSTRA and
2. H. DE WILDT,  
both carrying on business in partnership under  
the name style and firm of BOGTSTRA AND DE  
WILDT . . . . . (Defendants) *Respondents.*

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## Case for the Respondents

1. This is an appeal from a judgment and decree of the Supreme Court of Ceylon dated the 25th April 1949 whereby it was directed reversing a judgment and decree of the District Court of Colombo dated the 23rd June 1947, that the action brought by the Appellant be dismissed with costs both in the Supreme Court and below.

RECORD.  
pp. 59-71, p. 71.  
pp. 49-55, p. 55.

2. The fundamental issue in the action and the question which arises for determination in this appeal was whether it was established that at the end of 1939 or thereabouts a contract was made by the Respondent Bogtstra acting on behalf of the Respondent firm that the Appellant as part of his remuneration as a servant of the Respondent firm should be paid as from some and if so what future date not only the salary he had been receiving theretofore, but also a fixed proportion namely  $\frac{1}{8}$  of the profits of a Department of the Respondent firm of which the Appellant alleged he was in charge.

3. By his *Plaint* filed in the District Court of Colombo dated the 22nd December 1945 the Appellant alleged that late in 1939 it was agreed between himself and the Respondents (which on the evidence turned out to be the Respondent Bogtstra on behalf of the Respondent firm) that the Appellant should be in charge of the General Import Department of the firm (excluding textiles) including organising and canvassing sales and that as from the 1st April 1940 he should be paid a salary of Rs.150/- a month together with  $\frac{1}{8}$ -share of the nett profits of and/or earned by the said Department.

p. 5.  
p. 5, ll. 21-30.

p. 5, l. 31.

4. By the said *Plaint* it was further alleged that the Appellant from and after the 1st April 1940 worked in charge of the said Department and was paid salary as aforesaid together with the said  $\frac{1}{8}$ -share of profits for the years 1st April 1940 to 31st March 1941, 1st April 1941 to 31st March 1942 and 1st April 1942 to 31st March 1943, but that in respect of the period from and after the 31st March 1943 nothing had been paid to him in respect of the said share of the said profits which were estimated in the said *Plaint* to be for the period from the 1st April 1943 to the 31st March 1944 the sum of Rs.225,000/- from the 1st April 1944 to the 31st December 1944 (when the Appellant in fact ceased to work for the Respondent firm) the sum of Rs.35,000/-.

p. 6, ll. 1-2, 14-15.

p. 6, l. 6.

p. 6, l. 16.

p. 6, ll. 18-24.

5. By the said *Plaint* it was further alleged that the nett profits on transactions arranged or executed by the Appellant and on contracts put through by him before the 31st December 1944 completion whereof had not been completed by that date amounted to Rs.25,000/- and that a  $\frac{1}{8}$ -share of the profit or such portion thereof as was earned by the 31st March 1945 was payable to him pursuant to the said agreement.

p. 6, ll. 7-13.

p. 6, l. 25.

6. By the said *Plaint* it was further alleged that the Appellant, his salary having been increased early in 1944 to Rs.500/- a month, was wrongfully dismissed on or about the 29th November 1944 as from the 31st December 1944 and that no salary had been paid him in respect of the month of December 1944.

pp. 8-9.

p. 9, ll. 18-21.

p. 9, ll. 13-17.

7. By their Answer dated the 5th April 1946 the Respondents stated that they were always ready and willing to pay Rs.500/- in respect of salary for the month of December 1944 and that they brought the said sum into Court to the credit of the case. They denied, however, that there was any wrongful dismissal, alleging that in November 1944 it was mutually agreed that the Appellant's services should terminate by resignation on his part on the 31st December 1944.

p. 8, ll. 19-25.

8. By the said Answer it was further admitted that the salary of the Appellant from and after the original engagement in 1937 was Rs.150/- a month, increased as from the 1st January 1944 to Rs.500/- a month.

p. 8, ll. 28-30.

p. 8, ll. 30-35.

9. By the said Answer it was explicitly denied that there had ever been any agreement for the payment by the Respondents of a  $\frac{1}{8}$ -share of the profits of the Department referred to though it was admitted that *ex gratia* additions to salary had been paid to the Appellant in the form of a payment of Rs.5,000/- for the year ending the 31st March 1941, a payment of Rs.5,000/- for the year ending the 31st March 1942 and a payment of Rs.4,000/- for the year ending the 31st March 1943, these payments being in addition to a dearness allowance of Rs.1,200/- paid during the period July 1941 to December 1943.

10. From the pleadings it was accordingly apparent that there was no dispute between the parties as to the rate or payment of the Appellant's salary, apart from the salary admittedly due in respect of the month of December 1944.

11. As regards the issue as to whether there was a wrongful dismissal of the Appellant, the District Judge on the documentary evidence before him rejected the claim completely and no appeal from his decision in this respect was taken by the Appellant to the Supreme Court. Nor by his Petition of Appeal is it suggested by the Appellant that the District Judge's finding in this respect should be interfered with. The Respondents accordingly assume that this part of the Appellant's claim is no longer in issue. p. 54, ll. 12-20.

12. On the remaining issue, namely, whether there was an agreement in 1939 for the payment by the Respondents to the Appellant of a  $\frac{1}{3}$ -share of profits, the learned District Judge found in favour of the Appellant but his finding was on the Respondents' appeal reversed by the Supreme Court after an exhaustive examination of the documents relied on in support of it and of its inherent probabilities in all the circumstances of the case. It will be convenient in this case to consider these aspects separately, the only additional evidence being the Appellant's assertion that the Respondent Bogtstra made the promise alleged and the said Respondent's denial that any such promise had ever been made. p. 10, l. 9.  
p. 54, l. 22.

13. The first payment received by the Appellant was Rs.2,500/- on the 4th January 1941. The cheque and counterfoil were filled in by the Respondent de Wildt and the counterfoil which was produced (P.2) bore the words "advance against commission." A copy of the receipt which the Appellant alleged he gave (P.3) also bore the words "as advance against my commission account." The payment was recorded in the Respondents' cash book (P.10) as "advance against commission" and was carried into the Personal ledger of the Appellant (P.4) with the same words "advance against commission." This ledger was one of the Respondents' books, an account in this form being opened whenever an employee was given a loan or advance of any kind. In the case of the Appellant it went back apparently to the beginning of his employment in 1937: at any rate the first exhibited entry was a balance brought forward on the 1st April 1938 of Rs.227/47. At the end of the financial year on the 31st March 1941 the balance stood at Rs. 2,530/47 which was carried forward to the next relevant page (P.5). On the credit side of the ledger the relevant entry was "March 31st bonus Rs.5,000/-," and in the Journal (D.5) the record was of Rs.5,000/- paid as bonus. p. 81, l. 9.  
p. 11, l. 42.  
p. 77.  
p. 77.  
p. 81, l. 9.  
p. 79, l. 4.  
p. 32, l. 29.  
p. 78, l. 21.  
p. 79, l. 17.  
p. 85, l. 6.  
p. 85, l. 16.  
p. 86, l. 6.

14. On the 14th July 1941 a second payment to the Appellant was made of Rs.2,399/53 which, taking into account two small drawings of Rs.60/- for a bed and box spring and Rs.30/- for a gold wrist watch, brought the non-salary payment up to Rs.5,000/-. This was recorded in the cash book (P.10) as "in settlement of commission" and carried to the Personal ledger (P.5) under the same heading. The counterfoil of the cheque (P.7) which was in the handwriting of the bookkeeper Victoria also bore the words "in settlement of his commission account personal." p. 81, l. 17.  
p. 12, l. 41.  
p. 85, ll. 7-8.  
p. 81, l. 17.  
p. 85, l. 9.  
p. 79, l. 32.

15. In relation to the payment to him of Rs.5,000/- in respect of the year ending the 31st March 1941, the Appellant also produced a piece of paper (P.6) alleged by him to have been given to him by the Respondent p. 70, ll. 19-29.  
p. 12, l. 34.

Bogtstra and purporting to be headed " June 1941 B. & W. 1940—41 Profit and Loss A/c " and to show a profit for the year ending the 31st March 1941 on sundries, sugar and coffee of Rs.58,055/72. Against this figure was a completely unexplained set-off of Rs.301/04 producing a nett profit of Rs.57,754/68. This on the face of it bore no relationship at all—assuming there ever was an agreement for the payment of  $\frac{1}{8}$ -share of the profits—to a payment to the Appellant of Rs.5,000/-. In an attempt to explain away this transparent contradiction the Appellant gave an account of the Respondent Bogtstra having said that the books were not finally balanced and " Mr. Bogtstra went through the books with me and wrote the figures on a piece of paper and ascertained the profits to be Rs.57,000-odd. I produce the piece of paper on which Mr. Bogtstra wrote out the figures and handed to me." The piece of paper did not as above indicated show anything " odd " but showed a precise figure of Rs.57,754/68. The Appellant then continued that—" he (the Respondent Bogtstra) said that the department charges must be deducted and an amount set aside for income tax etc. and he deducted Rs.17,754/- and arrived at the figure of Rs.40,000/- and said I was entitled to Rs.5,000/- as my commission. I agreed to that." If it was purely a question of dividing 40,000 by 8 it is somewhat curious that it was necessary for the Respondent Bogtstra to say that the result was 5,000 and for the Appellant to say that he agreed with that result. How or why the Respondent should have arrived at Rs.17,754/68 as being the department charges and the amount to be set aside for income tax against a figure which, being a profit figure, had presumably already taken account of departmental charges and income tax liabilities, was wholly unexplained and is indeed, it is submitted, inexplicable. In cross-examination the Appellant said that the figures were in the books, but no attempt was made to call for the books and show where the figures appeared, although it was conceded that the firm's accounts were regularly audited. In short the figures were only intelligible on the basis that there was no agreed basis for any additional payment to the Appellant at all, but that the Respondent Bogtstra came to the conclusion, not as a matter of legal liability but as a matter of *ex gratia* reward, that an extra Rs.5,000/- was a reasonable reward to pay to the Appellant.

p. 12, ll. 31-4.

p. 12, ll. 35-9.

p. 19, ll. 33-7.

p. 13, l. 28.

p. 81, l. 21.

p. 85, l. 10.

p. 85, l. 12.

p. 85, l. 19.

p. 13, l. 33.

p. 19, l. 40.

p. 47, ll. 9-12.

p. 85, l. 19.

p. 85, l. 27.

p. 86, ll. 12, 21.

16. The next payment to the Appellant was Rs.500/- on the 20th December 1941. This was recorded in the cash book (P.10) as " advance against salaries " and in the Personal ledger (P.5) " advance against salary " was similarly recorded. The balance as at 31st March 1942 was however recorded as Rs.4,500/- : in other words the Appellant was being credited for the year ending the 31st March 1942 with Rs.5,000/-, the same figure as for the year ended the 31st March 1941, and this credit was duly recorded under the heading " bonus " in the ledger.

17. No further payment was made to the Appellant until the 30th October 1943 when he was paid Rs.8,500/-. In 1942 there had been the Japanese air-raid and the Appellant had apparently been away in India for a good deal of 1942 and 1943, but he had meanwhile been credited in the Personal ledger with " bonus " of Rs.5,000/- as at 31st March 1942 and " bonus " of Rs.4,000/- as at 31st March 1943. Corresponding entries appeared in the Journal (D.5). In other words so

far as the books showed there was a credit to the extent of Rs.9,000/- in respect of two years' bonus, less the Rs.500/- advanced on 20th December 1941 leaving a credit of Rs.8,500/-. The payment of this was recorded in the Personal ledger as "Cash in settlement of commission." The cash book (P.11) also referred to "balance of commission Rs.8,500/-."

p. 85, l. 30.  
p. 101, l. 18.

18. The Appellant's version of this payment was somewhat remarkable. He produced again a piece of paper (P.8) alleged to have been given him by the Respondent Bogtstra showing the profits on sundries, sugar, coffee and Indian coffee, and said that this was made out for the purpose of arriving at what was due to him for the two years 1941/1942 and 1942/1943. This cannot have been right because the figures for the year 1940/1941 were also included. For the other two years the figures showed Rs. 106,368/- and Rs.40,973/- respectively, neither of which bore the slightest relationship to the bonus in fact credited. To get over this difficulty the Appellant's version was that the two years were lumped together, then Rs.75,000/- deducted on account of overheads, bonuses and dearness allowances leaving a sum of Rs.72,000/-. It was, of course, necessary to arrive somehow at this sum in order to justify a claim that Rs.9,000/- for the two years was one-eighth of the profits.

p. 13, ll. 18-28.  
p. 84.  
p. 19, ll. 42-6.

19. At first sight it might appear that the Appellant's case was supported by these documents in so far as they contained references to commission. In fact, however, the Appellant made it quite plain that he was not and never had been claiming commission: the agreement he was alleging was for a share of the profits, a very different thing. And in not one single instance did the payments in fact made to him—none of which he challenged in any way as being incorrect—correspond with the profits as shown in the documents he himself put in and relied on. Nor at any time was there any question or suggestion of a proper certification by an accountant of the profits so as to show how the sums paid were related to them—a somewhat remarkable feature in the case of an orderly run business with accounts audited by Chartered Accountants as the Respondents' was admitted to be. In fact therefore the documents produced, so far from supporting the Appellant's case, tended strongly to support the account put forward by the Respondent Bogtstra namely that the payments made were gratuities or bonuses paid at the discretion of the Respondents in consideration of the admittedly efficient service and hard work put in by the Appellant. The Respondent Bogtstra said that the use of the word "commission" was a mistake, that it ought to have been "bonus" throughout as it was in most places in the Personal ledger and throughout the Journal.

p. 15, ll. 37-41.

p. 20, ll. 4-7.

p. 28, l. 1.  
p. 29, ll. 13-20.

p. 29, ll. 43-5.

20. One further document relied on by the Appellant should be referred to, namely P.9, the day book of an entirely different business run by the Appellant at Diyatalawa with financial assistance from the Respondent Bogtstra. In his evidence the Appellant picked out three entries which he relied on, namely 4th January 1941 relating to a cheque for Rs.2,500/- "being part advance on commission due"; 16th July 1941 "to amount due on commission account for the year 1st April 1940 to 31st March 1941 Rs.5,000—by Hong Kong cheque Rs.2,399/53"; and "20th December 1941 by Hong Kong Bank Cheque, being advance towards

p. 80.  
p. 11, l. 32.  
p. 13, ll. 7-10.  
p. 80, l. 10.  
p. 80, l. 22.  
p. 80 l. 39.

p. 48, ll. 1-4. amount due to me on profit for year 1941-2 Rs.500." It was not until Counsel's closing speech that a further entry was found and strongly relied on, namely 16th July 1941 being "amount received from B. and de W. towards commission for year 1st April to 31st March 1941 based on  $\frac{1}{8}$ -share of nett profit of Rs.40,000 for the Sundry Department—Rs.5,000/-." Why there should be the second entry in respect of the year ending 31st March 1941 which had already been fully recorded was never explained. Nor was there any explanation as to why payments made to the Appellant as servant of the Respondents should appear in the books of an entirely different business at Diyatalawa. Nor was any satisfactory explanation given as to why, if the payments were recorded, nothing was set down as to the admitted payment of Rs.8,500 except that "during that period I was not keeping this account." It is submitted that all these entries are highly suspect, and the Supreme Court, who examined the book found that it was not "of such a character that it commends any high degree of probative value." In any case, in so far as corroboration of the Appellant's story was sought, the Appellant's evidence could not be corroborated by entries of his own making.

p. 15, ll. 11-12. 10

p. 70, ll. 43-5.

21. Coming to the surrounding circumstances of the claim, the correspondence relating to the termination of the Appellant's employment is illuminating. The Respondent Bogtstra wrote on the 29th November 1944 a letter (D.3) confirming an earlier conversation (which the Appellant said never took place) whereby it was mutually agreed that he should resign by the end of the year. The reply (D.1) was from the Appellant's proctor saying that the Appellant was glad and relieved to sever his connection with the firm, and that "I am prepared to advise my client without prejudice to terminate his services immediately, waiving salary for the current month and bonus on condition that you settle what is due to him as commission immediately." The letter then asserted that "by 1940-41 . . . the firm was able to turn out a substantial profit out of which you paid my client Rs.5,000/- as commission he had earned and was lawfully entitled to on the basis agreed upon"—a very remarkable way of alleging a specific agreement to pay, not a commission, but a specific portion of the profits—"in 1941-42 the turnover was again just as satisfactory and you paid my client a similar sum. In the following year 1942-43 trading conditions suffered a slight set back and you were able to pay my client only Rs.4,000/-"—no suggestion then of the two years being aggregated and an arbitrary sum deducted from the profits as recorded in the books. Later it was stated "In 1943-44 you netted a profit in the neighbourhood of  $2\frac{1}{2}$  lakhs and there is due to my client as even minimum commission a sum of Rs.25,000/- more or less"—a calculation which bears no resemblance to a  $\frac{1}{8}$ -share. The reply from the Respondents' proctor (D.4) denied liability for anything except salary for December 1944 and added "My clients wish me to add that they have been treating your client very fairly and generously and that the receipt of your letter makes them feel inclined to think that their kindness has been somewhat misplaced." The reply from the Appellant's proctor, (D.2), after referring to the "claim for commission on the mutually agreed and provable basis for 1943-1944" threatened proceedings unless a cheque for Rs.25,000/- was sent and added "it is only the receipt immediately of a cheque as stated that will stay my client's hand and avoid the exposure

p. 102. 20

p. 21, l. 6.  
p. 103, l. 12.  
p. 103.

p. 103, ll. 16-17.  
p. 103, ll. 26-9.

p. 103, ll. 30-4. 30

p. 103, ll. 34-8.

p. 103, l. 40.  
p. 104, l. 2. 40

p. 104.

p. 104, ll. 40-2.

p. 105.

p. 105 ll. 11-12.

p. 105, ll. 23-6. 50

that may prove very damaging to their business interest." The Supreme Court regarded these letters, it is submitted rightly, as not the sort of letters which would have been written if precise and definite facts were within the knowledge of the writer but rather as indulging in circumlocution and "reconnoitering the terrain" in the absence of any decided basis for making a claim. Nothing further was done until proceedings began a year later.

22. At the trial in the District Court of Colombo the Appellant gave evidence alleging the oral agreement on which he relied and producing  
 10 the documents to which reference has been made. In his favour the learned District Judge stated that he "gave his evidence quite well. He did not contradict himself on any material point." Judged by the learned Judge's own notes this was a somewhat charitable view. If one takes only the discrepancies pertinent to the direct issue in the action they were somewhat glaring. Having relied all the way through his evidence in chief on documents referring to commission, he admitted in his first two answers in cross-examination that his claim was not for commission at all and that he did not know why entries in the books had ever been made under the title "commission." Again, his Plaintiff alleged  
 20 that his employment was to be "in charge of the General Import Department of the firm" but in cross-examination he admitted that the Respondent Bogtstra "was not a sleeping partner, he was in charge of the department and I worked under him as his direct assistant . . . I do not know whether it can be said that I was in charge of the department, but I was his direct assistant." Later he tried to reverse the positions by asserting that "all that was not done by Mr. Bogtstra, I was in charge of everything. I wanted Mr. Bogtstra's assistance because I had no authority in the firm. I did not run the firm, he ran the firm and he wanted me to run it for him." That the head of a department should  
 30 have no authority is a rather astonishing situation. The real truth of the business aspect of the position emerged when he said that "any goods that came in could be easily sold. The difficulty was in getting import permits" in other words it was not the case of a vigorous outside canvasser producing new business—profits were inevitable, as appeared from the evidence of the Respondent Bogtstra, as long as the necessary war-time permits were obtainable. The Appellant's further explanation was even more unsatisfactory—"most people did not understand the implications of import licences. It was in that year that Messrs. Bogtstra and de Wildt came into prominence because we knew how to do the work. Mr. Bogtstra  
 40 was in the office giving me moral assistance and asking me to carry on." It was no doubt very generous of the Appellant to carry on with no more than moral assistance when in his own words "I could have done all this business on my own account," but this hardly explained why he should be content with a mere Rs.5,000/- for the year ending 31st March 1941 if there was a profit of Rs.57,754/68 available for him on his own account.

23. The real truth of the matter emerged in his cross-examination when he admitted that about the end of December 1943 he told the Respondent Bogtstra that he was a married man and wanted more salary. He had apparently been having a child each year and professed to have  
 50 been offered at that time a salaried job in India on very attractive terms.

p. 20, l. 15.

p. 20, l. 36.

p. 20, l. 16.

p. 66, ll. 16-43.

p. 20, ll. 19-21.

He received at that time, without any question, an increase in salary (apart from dearness allowance) from Rs.150 a month to Rs.500 a month, in other words from Rs.1,860/- a year to Rs.6,000. He said that this was quite irrespective of "the usual commission," but the Supreme Court, it is submitted rightly, concluded that this was far more consistent with there having been no fixed agreement for any payment over and above salary—that having seen his *ex gratia* bonuses reduced from Rs.5,000 to Rs.4,000 in the last twelve months (reducing his annual income from Rs.6,860 to Rs.5,860) he came to the conclusion that a definite Rs.6,000/- a year was better security for a married man with an increasing family than a salary of Rs.1,860 plus an *ex gratia* bonus which might in the future be even lower than the latest reduction : particularly as he admitted that at the time when he asked for the increase in salary "the profits were not so big as there was trouble in the office and the business was affected."

p. 53, ll. 43-5.

p. 53, l. 45.

p. 54, ll. 1-6.

p. 54, ll. 7-8.

p. 54, ll. 8-11.

24. It must on the other hand be recorded that the learned District Judge expressed the view that he found the Respondent Bogtstra "most unreliable in the witness box" on the ground that "he contradicted himself more than once and said things that could not possibly be true." Unfortunately the learned Judge gave no examples under either head, and it is difficult from the notes to see what, if anything particular, was in his mind. He described him as being for a Dutchman extraordinarily voluble, though not unhandicapped by reason of unfamiliarity with the English language, instancing a nice appreciation for the word "insistence," quoting an example which was quite irrelevant to any matter in issue. The learned District Judge concluded that "as between the Plaintiff and the first Defendant I have no hesitation in accepting the word of the former." Accordingly he concluded that the alleged agreement, the only evidence of which was the oral evidence of the Appellant, was established.

p. 54, ll. 21-36.

p. 54, l. 37, and  
p. 55, l. 9.

pp. 55-6.

25. In accordance with his said conclusion the learned District Judge found that the Appellant was entitled to a share of profits on the basis claimed by him and to an accounting to ascertain those profits. He dismissed, for reasons indicated above, the Appellant's claim to damages for wrongful dismissal, but allowed the undisputed claim to salary for the month of December 1944. A decree of the District Court dated the 23rd June 1947 was entered accordingly.

p. 6, ll. 18-22.

26. It is to be observed that the learned District Judge did not differentiate in any way between the claim for a share of profits while the Appellant's employment continued and the same claim after the valid termination of the Appellant's employment. In fact, however, there was a complete switch in the basis of the claim as regards the period after the 31st December 1944. From and after that date the claim was based upon orders procured by the Appellant but not yet executed, whereas for the period prior to that date it was based upon profits over the period in question without any reference at all to who had procured the relevant orders. This again is a clear indication of the fundamental unreliability of the whole of the Appellant's claim. In the case of a person, such as a commercial traveller, normally paid on the basis of a commission on the business he obtains, it is commonplace that he may well (provided the terms of his engagement on their true interpretation so permit) be entitled



to commission even after the termination of his employment: it all depends on whether his commission is payable on orders being obtained by him, whatever may be the date on which the orders are executed, in which case he has done all he can do to earn his reward as soon as his order is booked by the firm. It is entirely different where it is not a question of the commission payable on the booking of orders, but on profits accruing during the period of a person's employment: in such a case there is no basis for any payment of a share of profits after the termination of the person's employment.

10 27. The learned Judge in the District Court was influenced undoubtedly by the fact that the Respondent de Wildt was not called. This, it is submitted, was rather unfair. It was not contradicted that the Respondent de Wildt had retired from business and been more or less paid out. He had been in charge of the Drug Department of the business which was quite separate and had nothing to do with the making of the agreement alleged, nor was he in any relevant respect alleged to have had anything to do with the questions in issue apart from having signed one cheque "on account of commission." As neither the Appellant nor the Respondent Bogtstra were relying on this entry on the cheque as correctly  
20 representing the true position, it is difficult to see what assistance he could have given to the Court. It is respectfully submitted that his not being called cast no reflections whatever on the reliability of the Respondent Bogtstra's account of the matter, and if anything it redounds to his credit that he did not seek to call upon his partner to give evidence on matters which were not alleged to be anything to do with him.

p. 51, ll. 21-30.

p. 44, ll. 38-43.  
p. 26, l. 33.

28. The learned Judge in the District Court also commented on there having been no cross-examination of the only witness for the Appellant apart from himself, namely the Respondent's then book-keeper who had later joined the Appellant's firm in Madras. Apart from producing or  
30 verifying documents, his evidence was only material in so far as he said that he entered up P.7 as he did "because Mr. Bogtstra would have told me to write like that" and that he had got out P.8 at the Respondent Bogtstra's request. The latter is very likely, seeing that it was admittedly in Victoria's handwriting, while the former bore on the face of it its own inherent vagueness.

p. 53, ll. 4-5.

p. 15, l. 43.

p. 25, l. 4.

p. 25, l. 34.

29. The Respondents duly appealed to the Supreme Court from the said judgment and decree of the District Court of Colombo. The grounds of their appeal were set out in their Petition dated the 30th June 1947 which is contained in the Record.

pp. 56-9.

40 30. On the hearing of the said appeal the leading judgment of the Supreme Court, with which Gunasekara, J., concurred, was delivered on the 25th April 1949 by Nagalingam, J. The learned Judge indicated at the outset that an appellate tribunal does not ordinarily interfere with the finding of fact of a Court of first instance, but that when the appellate tribunal is itself in as good a position as the original Court to sift and weigh the evidence, it has its duty to perform. He stated that "Where

pp. 59-71.

p. 59, ll. 22-35.

p. 59, ll. 31-8.

disbelief of a witness expressed by the trial Court is based upon demeanour, that is a strong circumstance which the appellate Court would give full weight to : but where that disbelief is based on the ground that the witness has contradicted himself and where on examination the contradictions do not amount to anything more than an incapacity to explain or remember after a period of years certain facts, the appellate tribunal would be the more unfettered to examine the evidence afresh and arrive at an independent decision." This, it is submitted, was an entirely proper approach to the appeal under consideration.

pp. 60-71.

31. Nagalingam, J., then proceeded to a most exhaustive and penetrating analysis of the oral and documentary evidence in the case in order to ascertain in particular whether, having regard to the documents relied upon in support of the oral testimony, the claim as alleged could be regarded as established. The judgment in this respect extends from page 60 to page 71 of the printed Record and is too closely knit as well as too lengthy to be adequately paraphrased. Much of it is reflected in the foregoing paragraphs of this Case, but the Respondents will rely upon it in its entirety and will support it for the reasons contained in it. The conclusion of Nagalingam, J., was that "having regard to all these various considerations I accept the 1st Defendant's evidence and word that the Plaintiff's action is a speculative one and has been built on the quicksands of half truths and mutilated facts and must of necessity fail. I would therefore set aside the judgment of the learned District Judge and dismiss the Plaintiff's action in excess of Rs.500/- with costs both in this Court and in the Court below." A decree of the Supreme Court of Ceylon dated the 25th April 1949 was drawn up and entered accordingly.

p. 71, ll. 7-12.

pp. 71-2.

pp. 73-4.

32. The Appellant duly obtained on the 25th May 1949 conditional leave to appeal to His Majesty in Council from the said judgment and decree of the Supreme Court of Ceylon dated the 25th April 1949 and this leave was made final on the 27th June 1949.

p. 76.

33. The Respondents respectfully submit that the appeal should be dismissed and the said judgment and decree of the Supreme Court of Ceylon affirmed with costs for the following amongst other

## REASONS

- (1) BECAUSE the claim was one which ought properly to be closely scrutinised in relation to the documents produced in support of it.
- (2) BECAUSE on the documents produced by the Appellant himself no corroborative support existed for the claim made by him.
- (3) BECAUSE the District Judge of Colombo did not properly appreciate the import of the documents relied on by the Appellant.

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- (4) BECAUSE the District Judge of Colombo placed unjustifiable reliance on matters such as supposed contradictions or absence of testimony.
- (5) BECAUSE the District Judge of Colombo failed to attach adequate importance to the onus being on the Appellant to establish the claim he was making.
- (6) BECAUSE the judgment of the Supreme Court was right and ought to be affirmed.

STEPHEN CHAPMAN.

In the Privy Council.

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**ON APPEAL**

*from the Supreme Court of Ceylon.*

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BETWEEN

**MOHAMED AKBAR ABDUL  
SATHAR** (Plaintiff) *Appellant*

AND

1. **W. L. BOGTSTRA**, and
  2. **H. DE WILDT**, both  
carrying on business in  
partnership under the name  
style and firm of BOGTSTRA  
AND DE WILDT (Defendants) *Respondents*
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**Case for the Respondents**

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**LEE & PEMBERTONS,**  
46 Lincoln's Inn, Fields, W.C.2,  
*Solicitors for the Respondents.*