*Privy Council Appeal No. 72 of 1923.*

**Ahmed Khan Najoo Khan, since deceased (now represented by Suleman Khan and others)** - - - - - - *Appellants*

*v.*

**Ali Ebrahim Noor and another** - - - - - - *Respondents*

FROM

**THE COURT OF THE RESIDENT AT ADEN.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 21ST NOVEMBER, 1924.

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*Present at the Hearing:*

LORD SUMNER.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

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In this case the appellant, Ahmed Khan Najoo Khan, was the plaintiff in a suit in the Court of the Assistant Resident at Aden, and he sued two defendants, one who is now the effective respondent on this appeal, and the other his father, against whom no case has been made at all. The real issue lies between the appellant and the first defendant on the record.

Between these two parties an agreement of partnership was entered into in 1916. Their trade was to ship goods from Aden to places on the Somali coast, and with the proceeds of the sales to purchase local produce there and ship it back to Aden. The plaintiff carried on the business in Aden; the first defendant carried on the business at the places in Somaliland. The plaintiff found the money and that defendant presumably found the experience. The profits and losses were to be equally divided. Business went on between them until the end of the year 1917, after which the plaintiff in Aden shipped no further goods for

disposal in Somali ports, but, apparently as the result of his opinion that the trade was a losing one, exercised his right under the articles of partnership to determine the partnership at will.

For this purpose he wrote a letter in March of 1918, which he sent by the hand of his confidential clerk and general business representative, Abdul Razak Fatoo. This man was further armed with a special power of attorney, set out in the documents in the record, of which it is enough to say that it did not authorise him to appoint an arbitrator on behalf of his employer or to submit disputes to arbitration in accordance with a clause in the articles of partnership, but that it did authorise him, in discussion with the first defendant, to settle the accounts of the partnership, to collect what money he could, and apparently, though this is immaterial for the moment, to sue for any balance which might be found due on the taking of an account.

The partnership having been brought to an end by the delivery of the letter, proceedings took place between Abdul Razak Fatoo and the first defendant at a place called Meidi in Somaliland, which form the subject of the dispute in this case.

In the suit, which he did not commence until upwards of a year after the return of Abdul Razak Fatoo to Aden, the plaintiff claimed that partnership accounts should be taken between himself and his partner, and he also alleged, what he never proved, irregular dealings between the first defendant and the second defendant in breach of his rights as a partner.

In the Court of the Assistant Resident at Aden, after witnesses had been examined and documents put in, the amount claimed was decreed in favour of the plaintiff, largely upon the ground that the defendant partner, in spite of the order of the Court, failed to produce any of his books of account for inspection.

Upon appeal to the Court of the Resident himself the parties, or one of them, applied that a case should be stated for the opinion of the High Court of Bombay, in accordance with the Aden Courts Act, No. 2 of 1864, Section 8, and the Resident, in stating his case, stated also his opinion, formed upon the materials before him, that there should be a provisional decree for a partnership account.

The High Court of Bombay took the contrary view to that which had been taken by both Courts in Aden, and when their decision upon the special case had been returned to Aden, the suit was dismissed accordingly. Hence it is that the appeal comes before their Lordships.

Now the question which really went to the root of this difference of opinion is this: Was what took place at Meidi an arbitration of a dispute which had arisen between the two partners, followed by an award pronounced by arbitrators between them, or was it in truth an adjustment of the partnership accounts between Abdul Razak Fatoo himself and the first defendant,

taking the form of a settled account and followed by such a delivery of goods in stock and cash in hand as constituted a discharge of the balance shown upon the account so stated ?

In the proceedings in Aden it is true that the defendant and the persons who were concerned with the transactions at Meidi did repeatedly call this proceeding an arbitration, resulting in an award. In the pleadings and also in the notice of appeal to the Court of the Resident the same course was pursued, and the terms "arbitration" and "award" were used. But two things are to be observed. One is that the award, so-called, was expressed in a document of considerable length which was pleaded in defence, and was duly brought before the Court, and, therefore, though it may have been called an arbitration, neither the Court itself nor the plaintiff was in the least deceived, for the true tenor of the document appeared upon its face; the other is that, whatever the first defendant may have called it, honestly or dishonestly, and whatever he may have thought that it was, it could not be turned into an award if it was really not an award and it could not be deprived of its character of a settlement of account, if that was the true character which it intrinsically bore.

There is no doubt, in their Lordships' opinion, agreeing with the opinion of the High Court in Bombay, that upon the construction of the document itself it constituted a direct settlement of account of all questions arising between the two partners. It ended in the finding of a balance in goods and in cash, due from the first defendant to the plaintiff, and in a statement signed by the agent, Abdul Razak Fatoo, that he had received the goods and the cash in settlement.

It is clear also that upon the power of attorney, which this man held, to effect such a settlement of accounts and to receive the goods and cash in discharge, this settlement was within the authority conferred upon him, and therefore it follows that the reliance upon what took place at Meidi as an arbitration and award ceases to be of any substantial importance.

This agent set up two answers of fact: One, that he signed the document under the impression that it was only a receipt, which nobody appears to have believed, and which certainly their Lordships do not; the other that he was coerced into signing it because he was alone in Meidi and was surrounded by the more or less threatening friends and counsellors of the first defendant; that he was told that he must sign it before he could be allowed to return to Aden; that he was afraid, and that Meidi was a place where people who were disobliging were occasionally put out of the way.

The evidence of those facts is very shadowy. It was discredited by the High Court in Bombay; it does not appear to have been accepted by the Courts at Aden, who certainly do not rest their conclusions upon it, and their Lordships dismiss this defence.

There has then been raised, thanks to the industry and the skill of counsel, a further contention with regard to the document, which their Lordships consider to be the statement in writing of a settled account between the partners, and it is that though it was, may be, a settled account, it was not a settlement of all accounts; that there were transactions between the parties which were not brought into this account, and which, therefore, have never been settled. These transactions, it is suggested, are connected with that part of the business, which consisted of purchasing local produce in Meidi or other Somali ports and shipping it, by the plaintiff himself, to Aden for sale on account of the partnership. This is a point which does not appear to have been really made in the Courts below, for no consideration of it appears in the judgments delivered. It is quite true that the plaintiff pleaded that his partner had shipped goods to the second defendant, his father, and this was followed by a surmise—it amounted to no more—that he had only purchased the goods by committing a breach of his duty as a partner and applying to these purchases the proceeds of partnership goods shipped to him at Meidi or Gaizan, or wherever it was, but that case was made little of at the trial, and it may be said to have now disappeared. Further, the contention that there were any transactions of the kind suggested is not supported on an examination of the plaintiff's own accounts. Of course, if goods were shipped to Aden the realisation of them was in the plaintiff's own hands in Aden. Whether such goods were ever shipped or not must, on the view of the plaintiff himself, have depended on the question whether the first defendant had proceeds of shipments in his hands which he had not already remitted to the plaintiff at Aden.

Now the plaintiff's shipments to him having ended with the year 1917, as appears by the plaintiff's own account, and the remittances to the plaintiff having undoubtedly accounted for a very substantial sum, an examination of the letters written to the plaintiff at the time tends to show that in truth there were no transactions of the kind suggested, which required any account at all. It is not necessary, perhaps it is not practicable, to go into these inferences in detail, but there is sufficient material upon the accounts filed by the plaintiff himself of the transactions both ways to warrant the conclusion, that this never constituted a substantial issue between the plaintiff and the first defendant, either at the trial or before it, nor was it really alleged that there were further transactions to be dealt with other than those which the document of settlement of accounts deals with on its face.

Their Lordships are therefore of opinion that this point is, in substance, a new one only raised before their Lordships' Board, and does not warrant any dissent from the view that was taken in the High Court of Bombay.

As to the case that was made that the defendant refused

to produce his books when he was ordered to do so, it was very reprehensible of him to refuse to comply with an order of the Court. If the order of the Court was wrongly made, presumably he could have appealed against it. Whether he should have been dealt with in Aden for non-compliance as he would have been dealt with here, it is not necessary to consider—but, whatever suspicion may be cast upon his conduct by this refusal cannot alter conclusions, which really turn upon the construction of the two documents in question. He says that he has an excuse, though why he did not succeed in bringing that excuse before the judge of the Assistant Resident's Court he does not explain. If he had done so no doubt it would have been fully considered, but his excuse is that his books had been left in the charge of a friend in Somaliland, and the friend, with or without the books, had disappeared, and it was useless to pursue the subject. Their Lordships are unable to see that this episode assists the appellant on this appeal in any way.

The result, therefore, is that, founding themselves, as the High Court in Bombay did, upon the documents, which are intelligible and clear, and not upon the very conflicting evidence of persons examined in Aden, who contradict one another and themselves, and whose credibility is very difficult to estimate, their Lordships think that the conclusion of the High Court in Bombay was right and that the appeal must fail.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

**In the Privy Council.**

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AHMED KHAN NAJOO KHAN, SINCE DECEASED (NOW REPRESENTED BY SULEMAN KHAN AND OTHERS)

*v.*

ALI EBRAHIM NOOR AND ANOTHER.

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DELIVERED BY LORD SUMNER.

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