

Privy Council Appeal No. 30 of 1924.

Mahomed Khaleel Shirazi and Sons - - - - - *Appellants*
v.
Les Tanneries Lyonnaises and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 4TH FEBRUARY, 1926.

Present at the Hearing :

LORD FINLAY.

LORD BLANESBURGH.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal by the plaintiffs from a decree, dated the 14th March, 1922, of the High Court at Madras, which was made in its Appellate Civil Jurisdiction and varied a decree, dated the 20th October, 1920, of a Judge of the same Court, which was made in the Ordinary Original Civil Jurisdiction of the High Court.

The appeal arises in a suit which was instituted with the leave of the High Court on the 3rd February, 1919, in the Ordinary Original Civil Jurisdiction of the High Court by the plaintiffs, who live in the city of Madras, to obtain a decree against Les Tanneries Lyonnaises and their agent Monsieur J. Marret for money alleged to be due to the plaintiffs under a contract for the sale and delivery of goat skins under a contract of the 25th May, 1917, and under a contract of the 26th January, 1918, for the sale and delivery of sheep skins. There was another defendant to the suit named, C. Sowrimuthoorya Oodayar, against whom no relief was claimed. The suit was tried and the decree of the Trial Judge was made in the Ordinary Original Civil Jurisdiction of the High Court. The French company carries on business at Oullins, near Lyons, in France. Marret and Oodayar live at Pondicherry. The contract of the 25th May, 1917, was made by Marret as the agent of the French company with

the plaintiffs in the city of Madras, and the money which might become due under it was payable at a bank in the city of Madras. The contract of the 26th January, 1918, was made by Marret at Pondicherry, and the money which might become due under it was payable to the plaintiffs at the bank in the city of Madras. The Trial Judge made, on the 20th October, 1920, a decree for Rs. 1,76,242.0.5, with interest thereon and for costs against the French company, and by his decree dismissed the suit against Marret and Oodayar, but decreed that Marret should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the Trial Judge dismissing the suit against Marret. They had obtained a decree against the French company for their entire claim, and with that they were then content. As appears by the record, the French company and Marret jointly appealed to the High Court against the decrees which had been made against them. On that appeal the High Court found that the French company was not liable to pay anything in respect of the claim under the contract of the 26th January, 1918, and by its decree modified the decree against them made in respect of their liability under the contract of the 25th May, 1917, with certain costs, and dismissed the suit against Marret and Oodayar. Against that decree of the High Court this appeal by the plaintiffs has been brought.

In the High Court Marret on behalf of the French company and himself had filed a joint written statement. In this appeal for the first time the French company and Marret are represented by different counsel instructed by separate firms of solicitors. Those learned counsel raised preliminary objections to the appeal, the consideration of which their Lordships decided should stand over until the arguments on the appeal had been heard. Their Lordships will now state what those preliminary objections were and what is their decision on them. Each of the learned counsel contended that the suit was not within the cognisance of the High Court in its Original Civil Jurisdiction. The learned counsel for Marret further contended that this appeal to His Majesty in Council is, in effect, an appeal against the decree of the Trial Judge dismissing the suit as against Marret, from which decree the plaintiffs had not appealed, and that such an appeal was not allowed by the Code of Civil Procedure, 1908, or by the Letters Patent of the High Court. As to the objection that the suit was not within the cognisance of the High Court in its Original Civil Jurisdiction, their Lordships find that the contract of the 25th May, 1917, was made in the city of Madras, and it was agreed that the money payable under that contract should be paid in the city of Madras, and that it was agreed that the money payable under the contract of the 26th January, 1918, should be paid in the city of Madras, and further find that the High Court, under its Letters Patent, gave leave to the plaintiffs to bring the suit in the Ordinary Original Civil Jurisdiction of the High Court, and consequently hold that the suit was within the cognisance of

the High Court in its Ordinary Original Civil Jurisdiction, and disallow that objection. As to the objection especially raised by the learned counsel for Marret, that as the plaintiffs had not appealed against the decree of the Trial Judge dismissing the suit, excepting as to costs, against Marret, no appeal lay against him, their Lordships have been referred to the Code of Civil Procedure, Order 41, Rule 33, *Gangadhar v. Banabashi*, 22 Cal., L.J. 390, and *Bhaidas Shivdas v. Bai Gulab*, L.R. 48, I.A. 181. Their Lordships think that this appeal to His Majesty in Council in, so far as Marret is concerned, is, in effect, an appeal direct to His Majesty in Council from the decree of the Trial Judge, which is not allowable under the Code of Civil Procedure, 1908, or under the Letters Patent of the High Court, and they hold that the Code of Civil Procedure, 1908, Order 41, Rule 33, was not intended to apply to such an appeal, and they accordingly decide that the appeal, so far as Marret is concerned, should be dismissed, but without costs.

Their Lordships will now consider the appeal so far as it relates to the French company alone. The contract for goat skins of the 25th May, 1917, was made with the plaintiffs by Marret as the agent of the French company, and it is now admitted in this appeal by the learned counsel for the French company that Marret, in making with the plaintiffs the contract of the 26th January, 1918, for sheep skins, was the agent of the French company if he represented that he was making it as their agent.

The appeal involves the consideration of some complicated questions of fact. Before referring to the facts now admitted or proved at the trial or in the appeal to the High Court, the pleadings filed in the suit will, so far as they are material, be mentioned, and an affidavit of documents made by Marret will be referred to, and then their Lordships will state who the parties to the suit were, and briefly what was the business which each of the parties carried on, as these are matters which appear to their Lordships to be more or less material in the consideration of the appeal.

The plaintiffs, alleging in their plaint that Marret was the agent of the French company in making with them the contracts already mentioned of the 25th May, 1917, for goat skins and of the 26th January, 1918, for sheep skins, and in purchasing the goat skins and the sheep skins from the plaintiffs, claimed a decree against the French company and Marret, or either of them, for Rs. 1,70,000, and, if necessary, that a decree should be made for such sum as might be found to be due, together with interest at 7 per cent. after the dates of the respective deliveries of the skins at Pondicherry, and for costs, and for such other relief as the nature of the case might require.

No written statement in answer to the suit, under circumstances which will be later mentioned, was filed by Oodayar. The French company and Marret jointly filed a written statement, by which they submitted that the leave to sue them in the High Court ought not to have been granted and should be revoked, and

in which they admitted that the contract of the 25th May, 1917, for goat skins was entered into by the plaintiffs and the French company through Marret as their agent, and alleged that Oodayar was a partner of the plaintiffs and in effect alleged that the moneys payable to the plaintiffs under that contract were paid either to the plaintiffs or to Oodayar as a partner of the plaintiffs, and that nothing was due to the plaintiffs. As to the claim under the contract of the 26th January, 1918, for sheep skins, the French company and Marret in their joint written statement alleged that the French company was not a party to that contract and was not concerned in it, and that it was a contract made by Marret on his own behalf and not as an agent with the plaintiffs, to whom it was alleged that the sheep skins never did belong, and had never been purchased by the plaintiffs or on their behalf, and had been bought and paid for by Marret with his own money. As later appeared, what was pleaded in the joint written statement meant that Marret had purchased the sheep skins from Oodayar and had paid Oodayar for them, and that nothing was due to the plaintiffs in respect of the sheep skins.

Marret was examined as a witness in the suit before the Trial Judge. His credibility as a witness is one of the serious issues in the case. His examination began on the 7th October, 1920. When cross-examined he stated that he had been an agent of the French company for nine or ten years and had first begun as their agent at Pondicherry when he made the contract for the goat skins in May, 1917. He also admitted in cross-examination that he told the French company from time to time how many skins he sent to them and that he had sent to them invoices of the skins and that he used to write letters on carbon paper to the French company in France saying how many skins were being despatched to them according to the invoices and he supposed that the French company received those letters. Marret on the 5th March, 1920, signed and swore an affidavit of documents in this suit in which not one of those letters or invoices is mentioned. His explanation was that the affidavit was prepared and forwarded to him at Calcutta, where he happened to be, and that he swore the affidavit of documents without noticing that it did not mention any of those letters or invoices. That is an explanation which their Lordships find it impossible to believe. Any competent and respectable counsel, vakil, solicitor or other lawyer must, in order to prepare that affidavit of documents, as part of his duty have asked Marret if he had written to his principals in France any letters informing them of the skins which he was shipping at Pondicherry to them and sending them the invoices of the skins. The French company must have received those letters and invoices as they remitted to the bank at Madras from time to time money to pay for the skins. Marret must have made and kept copies of those letters and invoices, but neither they nor any copy of them is mentioned in the affidavit of documents. But on what information or lack of information the person who prepared

that affidavit acted in preparing it their Lordships do not know. Whoever prepared it, it was a misleading and dishonest affidavit. And Marret admitted, when cross-examined, that he had read through the affidavit before he signed it and that the letters which he had written to the French company, and had not been disclosed in it, would show the amount of skins which he was advising his principals in France, the French company, had been shipped. He also swore that the words "Account books relating to this suit transaction," in the First Schedule to the affidavit, were not in the affidavit when he swore it, but he did not suggest by whom they had been added. When that affidavit was filed in Court it may have been intended that Marret should produce at the trial some account books in support of his case. That affidavit of documents was not the only matter as to which the evidence which Marret gave in his cross-examination was in the opinion of their Lordships unsatisfactory.

It is now advisable to state who the parties to the suit were and what business they respectively or in partnership carried on. The plaintiffs are two merchants at Madras and carry on business at Madras and at Pondicherry under their firm name of Mahomed Khaleel Shirazi and Sons. Part of the business of this Shirazi firm is the purchasing at Pondicherry and in various districts of India of skins of goats, sheep and of other animals, the curing of such skins and the sale and exporting of them when cured. The elder plaintiff had carried on before 1917 a business at Pondicherry of purchasing and selling skins. The plaintiffs purchased a tannery at Pondicherry in 1917, and at Pondicherry they sold and exported skins on their own account. The plaintiffs in 1917 extended their business of tanning skins at Pondicherry by taking some tanning pits near a tannery which Oodayar had there. The plaintiffs employed Oodayar to manage their tannery at Pondicherry, his remuneration being a one-sixth share of the net profits of the turnover in that business, but Oodayar had no authority to receive money due to the plaintiffs for skins sold by the plaintiffs on their own account. The French company carried on business at Oullins, near Lyons, in France. It is admitted that part of the business carried on by the French company was the purchasing of goat skins in India by Marret as their agent for delivery when cured to the Government of France for the use of French troops in the war which began in August, 1914. Marret on his own separate behalf was an exporter of cured skins from India. Marret had his skins cured by a process which is described as "half-tanning" or "pickling" them, which made the skins lighter and smaller in volume and easier for shipment and more valuable. Whether he had invented that method of curing skins their Lordships do not know, but it was known and described as his process. He alleged that he held a patent for that method of curing skins, but the attention of their Lordships has not been called to any evidence that he had a patent for curing skins which was in force in British India or in French India or elsewhere.

Marret and Oodayar agreed to carry on at Pondicherry a partnership business for five years from the 1st July, 1917, for the curing at Oodayar's tannery by Marret's process or other processes which Marret should find useful of goat skins, sheep skins and heifer skins for export to Japan, each to share equally in the profits. The plaintiffs did not know of the partnership between Marret and Oodayar until Marret mentioned it in giving evidence at the trial. The document of partnership was not disclosed until this suit was in appeal before the High Court.

Oodayar was not bound to devote his whole time to the business of the plaintiffs, and he and Marret were entitled to carry on that business in partnership without informing the plaintiffs of the fact; but whether it was wise or prudent under the circumstances of their connection in business with the plaintiffs to leave the plaintiffs in ignorance of their being partners in a skin-curing and exporting business is another matter. That secret partnership placed Oodayar in a conflicting position, and had much to do with the difficulties in which the plaintiffs were involved in their suit. In their Lordships' opinion the Trial Judge rightly came to the conclusion on the evidence that Marret and Oodayar had acted in collusion against the plaintiffs. Oodayar carried on a separate business on his own account at Pondicherry as a tanner.

Their Lordships do not know what books of account, if any, Oodayar kept. Presumably, as a business man, he would keep books of account in which he would enter the accounts of the tannery which he managed for the plaintiffs, the accounts of his own separate business, and the accounts of his partnership with Marret. Their Lordships do not know how business is carried on at Pondicherry, but they conceive that the plaintiffs would have been entitled to examine such accounts, if any, of their tannery business as Oodayar kept. The senior partner in the plaintiffs' firm was not called as a witness, but his son, Abdul Hussain Khaleel, the other plaintiff, swore that those books of account had not been examined by him or by his father. The plaintiffs were very seldom at Pondicherry, and when they were there their time seems to have been otherwise employed than in examining accounts. They appear to have had more confidence in Oodayar than he deserved. As has been mentioned, Oodayar was a defendant in this suit, and no relief was claimed against him. He did not file a written statement. After the time had expired within which Oodayar was entitled as of right to file a written statement, he applied to the High Court for leave to file one. That application was opposed by the lawyer acting at Madras for the French company and Marret, and was dismissed. Oodayar did not appear as a witness in this suit, and no application for an order for discovery by Oodayar was made or applied for. After all the skins to which this suit relates had been delivered, and after the plaintiffs had demanded to be paid for them, Marret sent to the plaintiffs what he alleged was a copy of an account received by him from Oodayar. The evidence of Oodayar was available. He was not however, examined as a witness at the trial, nor was his evidence

taken on commission. That copy is exhibit Q, which appears to have been much relied upon by the Judges in appeal. That alleged copy of an alleged account was not evidence of transactions which it purported to represent, nor did the plaintiffs admit that it correctly represented transactions between themselves and Marret or transactions between themselves and Oodayar or between Marret and Oodayar. The plaintiffs, however, put it in evidence as an alleged copy of an alleged account which Marret had sent to them after disputes as to the liabilities of the French company and Marret to the plaintiffs had arisen.

Before considering separately the contracts of the 25th May, 1917, and the 26th January, 1918, their Lordships will state, so far as it is necessary to do so in this suit, what is the law in India as well as in England with regard to payments of debts to a person who, as in this suit, is alleged by a debtor to have had the creditor's authority to receive them on his behalf. It is elementary law that when a creditor sues the debtor for the payment of a debt and the defence is that the debtor paid the debt to another person, it is for the debtor to prove that the other person had, or had been held out to the debtor by the creditor as having had the authority of the creditor to receive payment of the debt on behalf of the creditor.

In the joint written statement which, according to the record, the French company and Marret filed, it was alleged that payments had been made to Oodayar as a partner of the plaintiffs. It was proved at the trial that Oodayar was not a partner of the plaintiffs in either of the contracts with which this suit is concerned. That defence was abandoned and it was alleged by Marret in his evidence, as their Lordships understood his evidence, that Oodayar had been authorised by the plaintiffs to receive the payments on their behalf and later that Oodayar had been held out by plaintiffs to him as having their authority to receive them. That authority and the alleged holding out of it is not admitted and is denied by the plaintiffs, and in their Lordships' opinion there is no reliable evidence that Oodayar ever had or had been held out as having any such authority.

Their Lordships will now consider the case as to the goat skins, and will then consider the case as to the sheep skins. The claim in respect of the goat skins arises, as has been mentioned, under a contract made on the 25th May, 1917, between the plaintiffs and the French company through their agent Marret. That contract was made at Madras and is contained in the following two letters:—

“ Madras,
25th May, 1917.

“ Les Tanneries Lyonnaises, Societe Anonyme.
ad capital de 9,764,000 francs.
Oullins, Rhone,
France.

Messrs. Mahomed Khaleel Shirazi and Sons, Madras.

Dear Sirs,

With reference to our interview, we beg to confirm you herewith the conditions by which we came to a conclusion.

(B 40—4271)T

A 4

The raw goat skins of different places mentioned by us, will be purchased by you, on our account and deliver to us in Pondicherry.

On account of buying and financing, we agree to pay you a commission of ten per cent. (10%) on the said purchases.

Our monthly purchases may be of about thirty thousand (30,000) skins more or less, if no objections interfere with it.

Such business to begin with, on the 1st June, 1917, to finish on the 31st December, 1917, and to be continued by mutual consent.

The skins will be purchased with our consent concerning the prices and the qualities.

During the above stated period the goods-purchased will be our property.

The said skins are to be treated by our process in your tannery in Pondicherry, under our supervision and according to our instructions.

The charges for the curing, according to the above-stated process, will be Rupees seventeen and a half per hundred ordinary goat skins (Rs. 17.8.0).

All expenses of the tannery and for the curing, according the said process, to be borne by you.

For the cost of the goods and the cost of curing, a credit will be opened in sterling in a Bank of Calcutta, Bombay, Madras at your choice.

Such credit to be transferred to your account as soon as the goods are received by us in Pondicherry.

Exchange of the drafts, brokerage and covering expenses done with our consent will be borne by us.

If, from the time the raw goat skins are delivered in Pondicherry, the time exceed two months, an interest of 7 per cent. per annum (7%) will be charged to us.

The delivery of the goods to be done to us after due payment.

If during the way the goods going to Pondicherry, there be any railway or Government restrictions, we will not hold you responsible for it.

We have no objections for your tanning sheep skins in the tannery as long as it does not interfere with our work.

Please confirm textually the above agreed conditions.

Yours faithfully,

Per Pro Tanneries Lyonnaisés,

(Signed) J. MARRET.

Address :—

Tanneries Lyonnaisés,

c/o J. Marret,

Commercial Hotel, Madras.”

“ Madras,

25th May, 1917.

“ Mahomed Khaleel Shirazi and Sons,

Telegraphic Address : ‘ Khaleel.’

To—

Tanneries Lyonnaisés, Lyons.

Dear Sirs,

Yours of even date to hand. In reply we have to inform you that we confirm the same under the conditions mentioned hereunder, to which we agree upon.

Conditions.

1. The raw goat skins of different places mentioned by you will be purchased by us on your account and deliver to you at Pondicherry.

2. On account of buying and financing, we agree to receive a commission of ten per cent. (10%) for such purchases.

3. Your monthly purchases may be about thirty thousand (30,000) skins more or less, if no objections interfere with it.

4. Such business to begin with, on the 1st June, 1917, to finish on the 31st December, 1917, and to be continued by mutual consent.

5. The skins will be purchased with your consent in respect of quality and prices.

6. During the said period the goods purchased for you would be your property.

7. The said skins will be treated by your process (half tan) in our tannery at Pondicherry under your supervision and according to your instructions.

8. The charges to be paid by you for curing, according to the said process, will be Rupees seventeen and a half (Rs. 17.8.0) for hundred (100) ordinary goat skins.

9. All expenses of the tannery and for curing according to the said process to be borne by us.

10. For the cost of the goods and the cost of curing a credit to be opened by you in sterling in any of the banks in Calcutta, Bombay or Madras at my choice.

11. Such credit to be transferred to our account as soon as the goods are received by you in Pondicherry.

12. Exchange of the drafts, brokerage and covering expenses done with your consent must be borne by you.

13. If from the time the raw goat skins are delivered in Pondicherry exceeds two months an interest of seven per cent. per annum (7%) must be paid by you.

14. The delivery of the goods to you after the due payment.

15. We cannot stand responsible for transmitting goods to Pondicherry, if there be any restriction by railway or by any prohibition by Government. We can tan our sheep skins in our tannery at Pondicherry provided there would be no disturbance to your work.

Yours faithfully,

MOHAMED KHALEEL SHIRAZI & SONS."

"Our process," mentioned in Marret's letter, and "your process" mentioned in the plaintiffs' letter were the process of half-tanning for which Marret alleges that he had obtained a patent. The clauses, unnumbered in Marret's letter but numbered 10 and 11 in the plaintiffs' letter, mean, as their Lordships construe them, that the French company should secure that the payments would be duly made by opening an account in sterling at one or other of the banks in India mentioned and that the payments should be made to the plaintiffs by cheques or orders in their favour signed by Marret. The bank which was chosen for that purpose was a bank in Madras. Under that contract the plaintiffs delivered to the French company at Pondicherry the goat skins in respect of which this suit has been brought. There is no dispute as to the quantities of goat skins which were delivered under the contract. The French company paid through Marret direct to the plaintiffs considerable sums under the contract of the 25th May, 1917, leaving a balance due by them to the plaintiffs under that contract of the 25th May, 1917, as correctly found by the Trial Judge, of Rs. 81,737.0.9, and as incorrectly found by the High Court in the appeal of Rs. 25,824.14.2. The difference between the sums of Rs. 81,737.0.9 and Rs. 25,824.14.2 is explained by the facts that the Trial Judge believed the evidence given on behalf of the

plaintiffs by Abdul Hussain Khaleel, one of the plaintiffs, and did not believe the evidence given by Marret, while the High Court in appeal believed the evidence given by Marret and did not believe the evidence of Abdul Hussain Khaleel, and drew incorrect inferences from entries in exhibit Q. The difference between the sums of Rs. 81,737.0.9 and Rs. 25,824.14.2 represents sums of money which on behalf of the French company Marret alleged were paid to Oodayar, the receipt of which by the plaintiffs is not admitted and is not proved.

Abdul Hussain Khaleel and Marret were examined, and each was cross-examined at great length before the Trial Judge, and their Lordships, having carefully read the evidence which each of them gave, are satisfied that the evidence which was given by Abdul Hussain Khaleel may be trusted as truthful evidence, and that the evidence which was given by Marret cannot be regarded as truthful. That was obviously the view which the learned Trial Judge took of their evidence. Their Lordships find that the balance which was due by the French company to the plaintiffs under the contract of the 25th May, 1917, for goat skins was Rs. 81,737.0.9, as found by the Trial Judge.

What may have led the High Court in the appeal to think that Oodayar had the authority of the plaintiffs to receive payments from Marret on behalf of the plaintiffs was a transaction of August, 1917, which briefly was as follows:—It will be remembered that under the contract of the 25th May, 1917, the French company was not entitled to have delivery of any of the goat skins at Pondicherry until the contract price of them had been paid to the plaintiffs. In August, 1917, there were goat skins ready to be delivered to the French company at Pondicherry, the contract price of which was in rupees 10,800. Marret as the agent of the French company was anxious to ship them to France without any delay, but there was not then in the bank at Madras a balance upon which Marret could draw a cheque in favour of the plaintiffs, and he induced Oodayar to let him have delivery of the skins for the French company by giving to Oodayar his own cheque for Rs. 10,800, to be repaid to him when £2,000 should have been paid to the plaintiffs on behalf of the French company. On the 28th August, 1917, Oodayar from Pondicherry wrote to the plaintiffs at Madras informing them that “Mr. Marret had deposited with me Rs. 10,800 to be paid to him after the second remittance of 2,000 pounds credited in your account.” In reply to that letter on the 29th August, 1917, the plaintiffs from Madras wrote to Oodayar at Pondicherry as follows:—“We have noted that Mr. Marret has deposited Rs. 10,800 with you. You may spend those, and when £2,000 are received by us, we can send the money from here to be paid to Mr. Marret. Please do not draw upon us any further.” The £2,000 was apparently credited to the plaintiffs’ account on or by the 2nd September, 1917, as on that day Oodayar wrote to the plaintiffs: “As the second 2,000

pounds (is) credited to your account, Mr. Marret wants that 10,000 and odd rupees to pay freight for his goods, so please send the same to-morrow." On the 3rd September, 1917, the plaintiffs in reply wrote to Oodayar : " On hearing about the credit of £2,000 Mr. Marret wants his Rs. 10,000 and odd deposited with you. We have therefore herein enclosed a sum of Rs. 10,000 (ten thousand) half-notes, the receipt of which kindly acknowledge." In their Lordships' opinion no business man having the contract of the 25th May, 1917, and those facts before him, could come to the conclusion that the plaintiffs had held out to Marret that Oodayar had the authority of the plaintiffs to receive payments on their account, and their Lordships find that the plaintiffs never did hold Oodayar out as having their authority to receive payments on their behalf. There was another similar transaction, but it would not alter their Lordships' opinion that the plaintiffs had never held Oodayar out to Marret as having their authority to receive payments on their account. Whether Oodayar ever repaid to Marret any of the sums which Marret had advanced to him in order to get deliveries of skins their Lordships do not know. It is possible that they were applied by Marret and Oodayar in buying skins for their own business of curing and exporting skins, which began on the 1st July, 1917.

Their Lordships will now consider the contract of the 26th January, 1918, as to sheep skins. As introductory to that subject they will explain how that contract came to be made. It appears from a letter written by Oodayar to the plaintiffs on the 14th August, 1917, that Oodayar had been half-tanning sheep skins for the plaintiffs by Marret's process. These sheep skins were exported to Japan. There was at that time a prospect of securing a larger order for skins to be shipped to America. Marret had objected to his process being used except for goat skins required for the contract of the 25th May, 1917, and Oodayar in the letter of the 14th August, 1917, informed the plaintiffs that Marret would allow the process to be used on receiving a commission of 2 annas a skin, and that it would be advisable to agree with Marret to give him a commission of 1 anna for each goat and sheep skin half-tanned by his process. In that letter of the 14th August, 1917, Oodayar said :—

" I have written out my opinion, you may think over the matter and do as you please. Now I am half tanning on a small scale. But he is not fully aware of the same. I have been telling him that I am doing only 100 or 50 hides. If the thing is done on a large scale, he will come to know it somehow. He will give us trouble later on."

In reply to that letter the plaintiffs wrote to Oodayar on the 19th August, 1917, a letter in which the following passages occur :—

" I have received the letter written by you on the 14th and note the contents. In perusing it we find that you have written about very great matters. You have written that the gentleman (Marret) objects to the

making of half-tan sheep (skins) and that the patent has been registered for sheep and goat (skins) and all. It can never be done. He can register only his mark. How can he register in respect of other goods? I simply wrote to you that we could do the work in secret without letting the other Lubbaïs (tanners) know. . . . In a small tannery, sheep half tan may be done. There is no fear. There need not be any fear that it is done without his knowledge."

Further correspondence between the plaintiffs and Oodayar took place on the subject of half-tanning sheep skins without the knowledge of Marret, Oodayar urging that an arrangement should be made with Marret to give him a commission on sheep skins half-tanned by his process, and the plaintiffs instructing Oodayar to use the process more extensively in half-tanning sheep skins for them to export to Japan.

It appears that about November, 1917, Marret saw some letters in Oodayar's office from which he ascertained that his process was being used in half-tanning skins, and at some time between November, 1917, and the 26th January, 1918, Marret had induced Oodayar to hand over to him the shipping documents relating to a large consignment of skins which had been shipped and were then in transit to Japan on behalf of the plaintiffs, to whom they belonged. On the 26th January, 1918, there was an angry interview at Pondicherry between the plaintiffs and Marret about his process having been used in half-tanning sheepskins, and it was arranged that Marret should hand over to the plaintiffs those shipping documents belonging to the plaintiffs which Marret had obtained from Oodayar. With them this Board is not concerned, and it was agreed between the plaintiffs and Marret as and representing himself to be the agent of the French company that the contract of the 25th May, 1917, should be extended so as to include sheepskins and other skins, and the following two letters in the handwriting of Marret were exchanged between them :—

" Pondicherry,
26th January, 1918.

To—

J. Marret, Esquire
(Tanneries Lyonnaises),
Pondicherry.

Dear Sir,

With reference to our understanding please instruct your Bankers to transfer to our account the following shipment :—

	Yens.
25 bales, 10,000 sheep skins (19,042 lbs.) 	7·500
20 bales, 6,000 dry goat (9,900 lbs.) 	5·579
40 bales, 12,000 dry sheep skins (23,620 lbs.)	9·240

which were shipped to Mr. M. A. Raza, Yokohama. All the pickled skins shipped to Japan at the same time remaining your property.

Yours faithfully,

MAHOMED KHALEEL SHIRAZI & SONS.

" Pondicherry,
26th January, 1918.

Messrs. Mahomed Khaleel Shirazi & Sons,
Pondicherry.

Dear Sirs,

I beg to acknowledge receipt of your letter of this day concerning the skins shipped to Japan, and will instruct this day our Bankers to transfer or credit your account of all sums referred in the shipment of the following skins, made to Mr. M. A. Raza, Yokohama.

	Yens.
25 bales, 10,000 sheep skins (19,042 lbs.)	7·500
20 bales, 6,000 dry goat (9,900 lbs.)	5·579
40 bales, 12,000 dry sheep skins (23,620 lbs.)	9·240
All pickled skins shipped to Japan, remaining my property.	

Yours faithfully,
J. MARRET."

Mr. Justice Phillips, who tried the suit, was rightly of opinion that if Marret made the contract of the 26th January, 1918, as the agent of the French company the words "remaining my property" must be taken as meaning the property of his principals the French company. It appears from the correspondence that Marret frequently referred to himself as meaning the French company. Marret when cross-examined admitted that they had the same meaning as in the contract of the 25th May, 1917.

Mr. Justice Phillips found that the contract of the 26th January, 1918, was made between the plaintiffs and Marret as the agent of the French company as a continuation of the contract of the 25th May, 1917, and their Lordships agree with that finding. He also correctly found that the price of the sheep skins at Rs. 45 per 100 skins with 10 per cent. commission and Rs. 17.8.0 per 100 skins for tanning charges amounted to Rs. 67,326, adding that Rs. 67,326 to the Rs. 81,737.0.9 with interest on those sums at 7 per cent. he, on 20th October, 1920, gave the plaintiffs a decree for Rs. 1,76,242.0.5 with interest thereon at the rate of 6 per cent. per annum from that date to the date of realization. Mr. Justice Phillips dismissed the suit as against Marret and Oodayar, but decreed that the French company and Marret should pay to the plaintiffs the costs of the suit when taxed with interest thereon at the rate of 6 per cent. per annum from the date of taxation to the date of realization. On the 25th August, 1921, the plaintiffs' costs of the suit were taxed at Rs. 4,082.4.0.

Marret's defence to the sheepskins claim was that the sheep skins belonged to Oodayar and that the plaintiffs had no interest in them. That in the opinion of their Lordships was an untrue defence, and rightly failed. But the finding of the High Court in Appeal was, as their Lordships understand it, that the plaintiffs had made a present to Marret of the sheep skins in question in the suit. That view their Lordships cannot accept. By the sale of those sheep skins in Japan, Marret, when cross-examined,

admitted that he had made a profit of one lakh of rupees. It is not now disputed that the plaintiffs had paid the dealers in skins for those sheep skins.

As their Lordships have said, they cannot regard Marret's evidence as truthful. Mr. Justice Phillips did not consider that Marret's evidence could be relied upon. How the High Court in appeal came to a different conclusion their Lordships do not understand. They will now quote briefly from the judgment of Mr. Justice Coutts Trotter, from which Mr. Justice Ramasam did not dissent, a passage in that judgment which shows what a high opinion Mr. Justice Coutts Trotter entertained of the reliability of Marret as a witness. It may be observed that Mr. Justice Phillips saw Marret when he was being examined and cross-examined and the High Court in appeal had not that advantage. Mr. Justice Coutts Trotter said in his Judgment: "I now come to the sheep skins and M. Marret's threats against the plaintiffs for infringing his process in respect of them. It seems from the arbitration account to be quite clear that these skins were in fact collected from the dealers and supplied by the plaintiffs. It is not in the least clear that M. Marret knew that at the material time. His evidence I think amounts to this: When he found himself confronted by a claim in respect of sheep skins which were not touched by the contract he took up an alternative attitude, 'Either these sheep skins do not belong to you, or if they belonged to you as you now say they formed no part of our contract and you had no business whatever to use my special process in treating them without my permission.' I see no reason why he should not take that line, and I do not think that his threats about infringement in any way militate against the view that he honestly believed that the plaintiffs had no concern with these goods whatever. I am therefore of opinion that the plaintiffs' case with regard to the sheep skins entirely fails.

Finally, with regard to the 85 bales of mixed dried sheep and goat skins. Though I think that M. Marret had no right whatever to take possession of the documents of title in regard to them, I am not prepared to reject his explanation that he believed, however wrongly at the time, that the plaintiffs were endeavouring to divert to other markets goods which ought to have been delivered to him and that he took possession of them in order to strengthen his position in enforcing his claim in respect of the sheep skins. It was no doubt an arbitrary and high-handed action, but I see nothing whatever to lead me to suppose that it was a consciously dishonest one." In their Lordships' opinion it was a dishonest action, as Marret must well have known. He could not have believed that he was entitled to the shipping documents which belonged to the plaintiffs.

Their Lordships think that in fairness to the French company they should state what the French company allege was the position in which that company found itself after this appeal to His Majesty in Council had been presented. The French com-

pany say that they were first informed by the solicitors in London appearing for Marret that this appeal had been presented, and as their Lordships understand the French company's statement that company had previously no knowledge that a suit against them and Marret had been brought. The French company say that the proceedings in the suit in Madras were defended by Marret without the knowledge or consent of the French company, and that on receiving that information from Marret's London solicitors that this appeal had been presented, the French company was advised that they should be separately represented in this appeal, and instructed their London agents that their case in the appeal should be settled and lodged with all due expedition. If facts could have been proved which would have justified application to amend the decree no such application was made.

There is one other question raised by the appellants in this appeal. It relates to the admission in evidence by the Court of Appeal of documents which were not in evidence before the Trial Judge. The High Court as a Court of Appeal in this suit had, under Section 107 of the Code of Civil Procedure, 1908, power to take additional evidence. In their Lordships' opinion it is a power which should be exercised by a Court of Appeal with much caution and only in suits where it is satisfied that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible. The additional evidence admission of which is complained of on behalf of the appellants, however much it may have affected the judgments in the Court of Appeal, has not affected the judgment of their Lordships in the slightest degree.

Their Lordships will humbly advise His Majesty that the appeal, so far as it relates to Les Tanneries Lyonnaises, should be allowed, and the decree of the High Court in appeal should be set aside against both respondents, with costs payable by Les Tanneries Lyonnaises, and the decree of Mr. Justice Phillips should be restored and affirmed, and that the appeal, so far as it relates to Monsieur J. Marret, should, save as aforesaid, be dismissed without costs. The respondents, Les Tanneries Lyonnaises, should pay to the appellants their costs in the High Court and in this appeal.

In the Privy Council.

MAHOMED KHALEEL SHIRAZI AND SONS

v.

LES TANNERIES LYONNAISES AND ANOTHER.

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