Privy Council Appeal No. 133 *of* 1936

The Firm of Gokal Chand-Jagan Nath - - - *Appellants*

v.

Firm Nand Ram Das-Atma Ram - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1938

Present at the Hearing:

LORD WRIGHT.
LORD ROMER.
LORD PORTER.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* LORD WRIGHT.]

The appellants are a firm of merchants carrying on business at Sialkot. The respondents are a firm of commission agents in Calcutta, who, from between 1919 and 1922, were employed by the appellants to conduct transactions for the purchase and sale of sugar and the purchase of gunny bags. The question in this appeal relates to three transactions executed by the respondents on behalf of the appellants in accordance with this course of business. These transactions were duly closed by the respondents with the other parties, and in the result three sums of money were respectively due on the balance of the transactions from Diwan Chand-Amar Chand Rs.1,275, from Chatter Bhuj Dossa Rs.8,670, from Kalu Ram Kanhaya Lal Rs.510. This was the position when the transactions were closed in October, 1920. But the three parties were in financial difficulties and in the result the respondents succeeded in obtaining payment of a part only of this indebtedness. This action was brought to recover from the respondents the differences between the sums due from the third parties and the sums of indebtedness set out above. The largest debtor was the firm of Chatter Bhuj Dossa, from whom in the result when the firm became insolvent in May, 1922, there was still a considerable sum outstanding. The respondents had taken hundis on account in March, 1921, and renewals in October, 1921, but no cash payment had been obtained save Rs.764-15-3. The hundis which were taken were in the respondents' favour and included sums other than those due in respect of the transactions conducted for the appellants. The respondents as commission agents had in the ordinary course in each case conducted the transactions in their own name and taken

a settlement from the third party for the whole balance of the account between them and that party, themselves apportioning that total sum between their different constituents, including the appellants. The appellants, for whom they had acted on that account, were not consulted before the hundis were taken, nor did they give any express authority to the respondents to accept hundis. The claim in the action was to recover the outstanding balance due to the appellants from the third parties, after giving credit in reduction for money actually recovered and paid over to the appellants by the respondents. The course of business in regard to the other two firms was the same, save that in their cases the debts for the balance became ultimately time-barred.

The Subordinate Judge held that the respondents were liable to pay to the appellants the sums not recovered from the third parties, on the ground that the respondents as agents in giving credit to the third parties instead of recovering money from them did so at their risk, especially if the third parties' financial position was shaky, and were therefore answerable to the appellants as their principals for the amounts of the debts ultimately not recovered. In other words, he held that the agent was liable for the loss accruing to the principal by the insolvency of the debtor to whom he had given long credit. He also dealt with questions of interest and other matters of account. From this judgment appeal was taken to the High Court. That Court reversed the judgment of the Subordinate Judge, apart from questions of interest, to which reference will be made later.

The High Court were unable to accept the statement of principle which has been quoted above as the principle on which the Subordinate Judge proceeded. In their opinion, the true principle was that the duty which the respondents as agents owed to the appellants their principals was to exercise due care, skill and judgment in getting in what they could by making the best bargain possible under the circumstances. The Court held that in the present case it was for the appellants as plaintiffs to prove that the respondents as defendants had failed in that duty, and had been guilty of negligence, and that they had failed to do so. On the contrary the Court held on the evidence that it was established that the respondents did all that was reasonably possible and that it was no fault of theirs that the realisations were not larger than they were. They accordingly varied the judgment of the Subordinate Judge by reducing the decretal amount to Rs.5,919-8-3, which represented the money actually collected by the respondents in respect of the three debtors, together with interest from the date of the institution of the suit until payment at 6 per cent. per annum.

Their Lordships are in agreement with the High Court as to the principles to be applied. They have also considered the evidence in the case and are of opinion that the conclusions of fact arrived at by the High Court are fully justified. On the question of principle, their judgment is that the case in question depends on determining what is the duty of an agent in a case where the third party, debtor to the

principal, is financially embarrassed. His duty then, in their judgment, is to do his best to collect all he can in the circumstances. It may be that it is more prudent not to press the debtor into immediate bankruptcy, but to take what he can in cash at the moment and to give time for the balance. This is what the respondents did in this case. They recovered a substantial amount of the indebtedness and there is no evidence that they could have recovered more. The evidence is that they could not. The appellants' Counsel have strenuously contended that the respondents are liable for the whole amounts eventually left outstanding on the ground that an agent is in general bound to receive cash in settlement of debts due to his principal, and has no right to give credit without express instructions from his principal, whereas in the present case the appellants gave no such instructions, and the respondents did not even ask for instructions until a later date after they had accepted the hundis. On this point it is retorted that the appellants took no notice of this request for instructions. But apart from that their Lordships are of opinion that the propositions relied on by the appellants are not applicable to a case like this. There are various authorities to the effect that an agent's authority is at least presumptively to settle in cash, in the absence of express authority to the contrary effect or of an authority by custom or usage. Thus in *Blumberg* v. *Life Interests & Reversionary Securities Corporation,* [1897] 1 Ch. 171, the question was whether a valid tender of mortgage money had been made; it was held that it had not because it had been made by cheque, which was not a good tender. Again in *Williams* v. *Evans,* L.R. 1 Q.B. 352, it was held that a purchaser at an auction sale could not claim that he had paid the purchase price as against the seller, when he had purported to do so by giving a bill of exchange to the auctioneer. That was no payment to discharge the purchaser as against the seller. Similarly in *Pape* v. *Westacott,* [1894] 1 Q.B. 272, an agent was held liable for parting with a licence against a cheque which was dishonoured, whereas he was only authorised to do so against cash. It is not necessary to multiply authorities on this point. But the position here is very different. This is a case where, the debtor being in financial difficulties, the agent gets all the cash he can and does his best to secure cash for the residue of the debt, thinking it best to give the debtor some time to pay. There is not here any question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash. In fact his duty is to do the best he can to get cash. The onus is on the plaintiff in such a case to prove that the agent has failed in that duty and that the plaintiff has suffered damage which he can only do by showing that the agent could have realised more cash in the circumstances of the case than he actually did. The onus is on the plaintiff to prove the breach of duty and the damage. An old case, *Russell* v. *Palmer,* 2 Wils. K.B. 325, illustrates that principle. The defendant was an attorney who, by his negligence, had failed duly

to charge a judgment debtor in execution, so that he was released from the prison in which he was held in respect of the debt. It was decided that the defendant was not liable for the whole debt but only for such part of it as might have been realised by execution, because the action sounded only in damages. So in the present case the respondents did not become guarantors of the debts on the debtors' insolvency. They could only be made responsible for the debts to the extent that it could be established (1) that they were negligent in seeking to realise them and (2) that loss resulted to the appellants from that negligence. Their Lordships agree with the High Court that the appellants have failed on both points.

A subsidiary question was raised about the interest claimable on the sums actually received. The High Court awarded interest from the institution of the suit, whereas the appellants have claimed that they are entitled to interest from the date of the demand, which was the 22nd July, 1922, the date of the institution of the suit being the 9th May, 1923. The amount involved is trifling and no question of principle is involved on the facts of this case, which in their Lordships' judgment do not take the case out of the ordinary common law rule recently discussed by this Board in *Bengal Nagpur Railway Co.* v. *Ruttanji Ramji,* 65 I.A. 66. Their Lordships will not repeat what was there said. In the present case no custom or contract to pay interest was proved, and further no reason has been shown for treating the debt as a debt in equity to which equitable rules as to recovery of interest can apply. In any case this question is not such as in the facts of the case to be a proper subject for invoking the appellate jurisdiction of this Board.

A further point was raised by the appellants. They urged that the judgment of the High Court appealed from was not a valid judgment because it failed to comply with Order XLI, rule 31, of the Code of Civil Procedure. The relevant facts on this issue are that the hearing in the High Court was before two Judges, Harrison and Agha Haider, JJ. and was actually delivered by the former Judge, the latter agreeing. The judgment was delivered on the 22nd February, 1933, but Harrison J. went on leave before signing the judgment, which was signed by Agha Haider J., the Deputy Registrar appending a note that Harrison J. had gone on leave before signing the judgment he delivered.

Order XLI, rule 31, requires that the judgment of the Appellate Court shall be in writing and shall state various matters, and "shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

The rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed the rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended

to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity. But in truth the difficulty is disposed of by sections 99 and 108 of the Civil Procedure Code. Section 99 provides that no decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of . . . any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. That section comes in the part dealing with appeals from original decrees. But section 108 applies the same provision to appeals from appellate decrees and it is always in the discretion of the Board to apply the principle on appeal to His Majesty in Council. In their Lordships' judgment the defect here was an irregularity not affecting the merits of the case or the jurisdiction of the Court, and is no ground for setting aside the decree.

Various cases on similar irregularities which have come before the Courts in India have been cited. Their Lordships do not find anything in these authorities to affect their decision here.

Their Lordships are of opinion that the appeal fails and should be dismissed with costs.

They will humbly so advise His Majesty.

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In the Privy Council

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DELIVERED BY LORD WRIGHT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E. 1.

1938