Privy Council Appeal No. 24 of 1942

Valarshak Seth Apcar - - - - - - *Appellant*

v.

The Standard Coal Company Limited and others - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH MAY, 1943

Present at the Hearing;
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal from a judgment and decree of the High Court at Calcutta in its civil appellate jurisdiction (dated the 28th February, 1941), which reversed a decree of the Court in its ordinary original civil jurisdiction (dated the 8th August, 1939) pronounced in an action in which the plaintiff (now the appellant) sued the four respondent coal companies to recover brokerage. The trial Judge (Lort Williams J.) gave the plaintiff the relief which he sought, but on appeal the Chief Justice and McNair J. dismissed the action.

The case is one of difficulty in that the rights of the parties depend upon happenings which took place many years ago, viz. at the end of the year 1919 and early in the year 1920, while the action was tried in the year 1939, and the truth has to be ascertained from the documents and the recollections of three witnesses, viz. the plaintiff, whose evidence was given in the witness-box before the trial Judge, and two witnesses for the defence whose evidence was taken on commission in England in the month of October, 1938. A feature peculiar to the case in this:—That while the trial Judge who saw the plaintiff, heard him give his evidence and was in a position to observe his demeanour as a witness, accepted him " as an honest and straightforward witness with a good memory for main facts, but as might be expected after such a lapse of time, not for dates or minor details," the High Court on appeal rejected the trial Judge's opinion, thought the plaintiff lacking in candour, and disbelieved his evidence.

Some facts, however, are not in dispute. The plaintiff was in the year 1919 a well known coal broker who carried on business in Calcutta. The four respondents were well known coal companies, whose managing agents were Heilgers & Co. The coal department of that firm was in charge of a Mr. Wills. In 1918 there had come into existence a limited company called the Indian Iron & Steel Company Limited (hereinafter referred to as the steel company) whose managing agents were Burn & Company, in which firm a Mr. Fairhurst was a partner. The steel company in December, 1919, had not yet started operations, but it was making or contemplating making forward contracts for coal, hoping at that time to be able to start operations in or about the year 1921. The plaintiff called on Fairhurst on

the 1st December, 1919, and having verified from Fairhurst the fact that the steel company was contemplating the purchase of coal, told Fairhurst that he knew a seller. It was arranged that he would bring the sellers in. On the following day the plaintiff called on Wills, and told him he could introduce him to a buyer of coal, and at Wills's request he took Wills round to Burn & Company's office and introduced him to Fairhurst. Terms were then discussed, the price being 8 annas above railway rates with a minimum of Rs.4-8 per ton. On the following day (December 3rd) Wills told the plaintiff to tell Fairhurst that he was willing to make a contract for 20 years for the sale of from 12,500 to 15,000 tons monthly. The plaintiff reported this offer to Fairhurst. The plaintiff took no part in negotiating the terms; as Wills said, the plaintiff took him to the buyer, that was all he did. Fairhurst and Wills agreed terms which were eventually incorporated in a formal contract executed by the steel company and the four coal companies. The date on which the contract was to come into operation was postponed from time to time, but eventually in the formal contract the date was fixed at the 1st April, 1923. By this contract the coal companies agreed to sell and the steel company agreed to buy 15,000 tons of coal monthly for a period of 20 years at 8 annas above State railways rates, with a minimum price of Rs.4-8-0 per ton.

In fact, unknown to the plaintiff, on the same 29th April, 1920, there was executed a second contract between the four coal companies and the steel company coming into operation on the 1st April, 1923, for the sale during 20 years of 20,000 tons of coal monthly at the same price and in other respects on the same terms as the price and terms contained in the other contract between the parties.

The plaintiff, after he became aware of the execution of this second contract, and that deliveries were being made under it, brought his action claiming brokerage commission thereunder as being a contract which resulted from his introduction of seller to buyer.

Upon those facts the plaintiff would appear *prima facie* to be entitled to whatever is the usual commission; for there can be little doubt that these two contracts executed at the same time resulted from the introduction. No legally binding relationship existed between the parties until the 29th April, 1920, and then the two contracts are simultaneously brought into being, constituting for the first time a binding relationship between the buyer and seller who had been brought together by the broker.

The issue between the parties can now be stated. The defendants allege that the plaintiff was not employed as a broker to introduce a buyer of coal generally, but was employed as broker for one specific transaction only, viz. to introduce a buyer who could enter into a contract to buy 12,500 to 15,000 tons of coal monthly, and that the only commission to which he is entitled is a commission due in respect of the first contract.

It will thus be seen that acute conflict exists as to what took place between the parties in the early days of December, 1919, which necessitates a close consideration of the oral evidence of the plaintiff, and Messrs. Wills and Fairhurst, and the documents available, as well as of the course of events which led up to the execution of the two contracts.

The plaintiff maintained throughout his evidence that in his first interview with Fairhurst a large monthly tonnage was mentioned, and that when he spoke to Wills of a possible buyer it was in connection with a large monthly tonnage. The figure stated by him in his evidence was 40,000 to 50,000 tons. On the other hand Fairhurst said that he told the plaintiff that they wanted about 15,000 tons; while Wills' evidence was that having looked at his records he saw that he was not in a position to contract to supply more than from 12,500 to 15,000 tons monthly; and that he instructed the plaintiff to make an offer to Fairhurst of 15,000 tons.

It is upon this issue that the Appellate Court reversed the findings of fact of the trial Judge, and held that the plaintiff " introduced Wills to Fairhurst for the specific purpose of effecting the sale of about 15,000 tons of coal, and once that sale was effected he had earned his brokerage

and was not entitled to any further remuneration however many contracts the parties might conclude." They treated the plaintiff as a witness whose testimony should not be believed, and accepted as accurate the evidence of Fairhurst and Wills.

In their Lordships' opinion the High Court on appeal was not justified in this case in taking a different view of the plaintiff's credibility from that adopted by the trial Judge. McNair J. enumerates a series of points upon which he bases his view that the plaintiff's evidence is such that reliance cannot be placed upon it, but they are just the sort of points as to which the only person who can effectively form an opinion and draw conclusions is the trial Judge who has the witness before him. He alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility, and whether after careful thought, or with reckless glibness. He alone could form a reliable opinion as to whether the plaintiff had emerged with credit from a cross-examination lasting the greater part of two days, which was to a great extent repetitious, and sometimes offensive.

Their Lordships' own opinion of the plaintiff's credibility, formed after careful consideration of the whole evidence, agrees with that of Lort Williams J. They think that making all due allowances for the effect on memory of the lapse of time, the plaintiff's story is in all main respects true and reliable.

Whether the plaintiff mentioned the actual figures of 40,000 to 50,000 tons, seems of small importance compared with the real issue, viz. did he bring Wills into touch with Fairhurst as with a person likely to be a large purchaser of coal, or did he merely bring them together for the sole purpose of effecting one single transaction, viz. a sale and purchase limited to 15,000 tons?

What are the probabilities? It is certainly not improbable that the agent of a new company like the steel company, even though its immediate requirements were restricted, should hint at future expansion and the possibility of larger requirements; nor is it improbable that Wills, while cautious as to his order at the time, should hope for and anticipate larger volumes of business thereafter. "He told me," says the plaintiff, "that he could at the moment offer 15,000 tons." While as a rule it is wrong to justify an estimate of probabilities by the ultimate issue of events, the circumstances of this case are so remarkable that they seem to afford a strong test whether the rule does not in this instance admit of an exception.

What are the facts? That simultaneously with the execution of the first contract, there was executed a further contract for 20,000 tons, on identical terms, is common ground. The estimate of probability is certainly justified by the result; but the respective dealings and conduct of the contracting parties during the period which elapsed between the introduction by the plaintiff and the execution of the contracts, must now be considered.

First, as regards the coal companies. Wills was in negotiation with the Tata Iron & Steel Company Limited (hereinafter referred to as Tata's) for the renewal of a 25 years' contract for the supply of 30,000 tons of coal monthly, but only at railway rates with a minimum price of Rs.3-12-0 per ton. Tata's were old customers of the coal companies, and before the incorporation of the steel company, were the only steel manufacturers on a large scale in India. A contract on those lines Wills was prepared to recommend to the coal companies, but that was before he had heard of the steel company as a purchaser and had secured his introduction to Fairhurst. On or about the 5th December, 1919, he received a letter from Tata's agent (Tutwiler) stating that Tata's were agreeable and asking for a draft contract on the above lines. In the meantime Wills had come to terms with Fairhurst at the larger price, subject of course to the approval of their respective boards. It is true that Fairhurst had somehow got to know of Tata's price, and had suggested that the steel company ought not to pay more; but on the 4th December Wills told Fairhurst by a letter of that date (with how little truthfulness can now be seen) that Tata's had

offered the larger price, and that he could not meet Fairhurst on the point. On the 8th December, Fairhurst wrote to Wills confirming the proposed contract to purchase 15,000 tons monthly at the larger price, commencing from April, 1921.

On the 19th December, 1919, Board meetings of the four coal companies were held at which the proposed contract with the steel company was approved. On the 20th December, 1919, Wills wrote to Tutwiler offering to negotiate a 20 years contract for 25,000 tons monthly at the larger price, an offer which was promptly refused. From that time, as Wills admits, Tata's were off, and a large monthly quantity became available to sell to the steel company. That a further dealing between Fairhurst and Wills had already been mooted is clear from a letter written by Wills to Fairhurst on the 2nd January, 1920, which contains the following passage:—"Regarding the further quantity you were requiring can you now come to a decision on this point? You informed me on the last occasion I saw you, you thought you could do something towards the end of February. My trouble is I have other long contracts pending and I must decide one way or the other by this time next week." To this Fairhurst replied on the next day:—"Regarding further quantities I am sorry we shall not be in a position to fix for more, until near the end of February, and I hope you can hold the matter over till then." A few days later Fairhurst suggested that the steel company should be given an option to purchase 20,000 tons monthly over a period of 20 years at 4 annas above railway rates, or (if with an option to extend the contract for a further 20 years) at 8 annas above railway rates; the contract to run from April, 1923. The option was given (and accepted) at 8 annas above railway rates, but with no power to extend the contract beyond the 20 years.

The dealings and conduct of the steel company during this period must now be considered. It is obvious from the letters of the 2nd and 3rd January, 1920, that Fairhurst (who was a director of the steel company) had since his introduction to Wills contemplated the likelihood of his company requiring to purchase further quantities of coal, and had so informed Wills. They had discussed the matter some time or times before the 2nd January, 1920, but exactly when or how often is left undetermined. The letter of the 2nd January, 1920, certainly suggests more than one occasion. Fairhurst however could not "fix" anything until near the end of February for reasons which the minutes of the Board meetings of the steel company directors make clear.

The steel company was still in its opening stage. Its initial plant was still in course of erection, indeed delays had occurred which had necessitated the postponement of the operation of the 15,000 tons contract to April, 1922. The coal contracts already negotiated provided enough for the initial plant. But the company was not to rest content with business on that scale; its ore reserves had been proved to be sufficient for not less than 100 years. A scheme was accordingly being considered, and worked out by the managing agents, which involved an increase of the company's capital by 15,000,000 rupees, the acquisition of two more blast furnaces, foundry plant, etc., and as a consequence the securing of forward contracts for the purchase of large quantities of coal. A Board meeting was held on the 13th January, 1920, at which the managing agents brought forward their proposal. They pointed out that they were in a position to purchase the best coking coal sufficient for doubling the size of the plant for 20 years ahead (this Fairhurst admitted referred to his discussion with Wills as to further sales); and that it was advisable to increase production while exchange was high, and plant could be purchased at low cost. The proposal was sanctioned, and directions were given for the summoning of an extraordinary general meeting of shareholders for the purpose of increasing the company's capital.

The reason why, notwithstanding Fairhurst's willingness to purchase and Wills's desire to sell further coal, Fairhurst was not "in a position to fix for more until near the end of February" is now apparent; first the directors and then the shareholders had to be consulted, and these things

take time. All went well, however, and on the 1st March, 1920, Burn & Company wrote to Heilgers exercising the option. Meanwhile the actual terms of the 15,000 tons contract had been settled between the parties, and these *mutatis mutandis* were to apply to the 20,000 tons contract. The two drafts were engrossed and the engrossments were duly executed on or about the 29th April, 1920.

Prima facie it is difficult to dissociate the two contracts, or to imagine that when the representatives of the buyer and seller had been brought together, the prospect of large dealings had no place in the contemplation of either. Fairhurst, however, alleged that it was not so, because (he said) the scheme which involved these large purchases by the steel company had not entered the mind of anyone until some date after the 20th December, 1919. It is difficult to believe, in regard to a scheme of this magnitude, that it can have been conceived, worked out, and adopted all within so short a period. The trial Judge felt unable to accept this evidence, and their Lordships feel the same difficulty. The only reason given by Fairhurst for his allegation shows that he has no real recollection about the matter, because he first purported to rely on a letter of the 20th December, 1919 (which was not forthcoming), and ultimately when pressed said " What fixes it so definitely in my mind is that at the time I negotiated the 15,000 tons contract I did not want any more." In the same way Wills, when asked when he first knew that the steel company required a further quantity of coal, bravely answers, " Subsequently to the 20th December. It is in the correspondence "; and when pressed why he says after the 20th December, his reply is " Because there are no other letters here." This witness also has clearly no recollection independently of what he sees in the correspondence; and the correspondence is of no assistance on this head, except to show that the prospect of further orders from the steel company had been under discussion some time before the 2nd January, 1920.

In their Lordships' opinion the trial Judge was right in accepting the evidence of the plaintiff (whose recollection and truthfulness he had the opportunity of judging) in preference to the testimony of witnesses which proved to be based on some correspondence which on examination failed to justify it.

Much stress was properly laid by Counsel for the respondents on the fact that the plaintiff in sundry letters written before action had made no mention of the large figures to which he testified in his evidence. That is true; and indeed he claimed at first under a contract which had been executed, securing his commission in respect of the 15,000 tons contract. On the other hand, the respondents in refusing to admit his claim, based their refusal on wholly untenable grounds. They alleged that he was entitled to commission in respect of the first contract because he had negotiated it; but that he was not entitled to commission in respect of the second contract, because it was made between the parties direct, without any negotiation by him. In truth, he negotiated neither contract. What he did was to introduce a seller to a buyer.

It is not until the matter is thrashed out and the evidence taken, that the true legal position emerges.

A broker who is employed by a seller to introduce him to a prospective buyer is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may be a question whether a particular contract results from the introduction or not. Once the parties have as a result of the introduction been brought into business relationship by means of a contract then entered into, it may well be that a subsequent contract carries no commission for the broker because the subsequent contract is the fruit not of the introduction, but of the satisfactory business relationship which the introduction established.

No such question can arise in the present case. There was no binding business relationship established between the parties until the 29th April, 1920, when at the one time, the two contracts in identical terms, and each the result of the introduction in the previous December were executed by the respective parties. Indeed, that the second contract was as much a result of the introduction as was the first is undeniable, and such was the view of both Courts.

Their Lordships are of opinion that the plaintiff was not employed by Wills merely to find a purchaser for a specified quantity of coal. Wills did not send for the broker. The broker came to him with an offer to introduce a purchaser, and Wills employed him to effect the introduction. This the plaintiff did, and thus became entitled to the usual commission upon the two contracts which resulted from that introduction. What is the usual commission is not in dispute; it is 1 anna per ton on all coal delivered and paid for under the contracts.

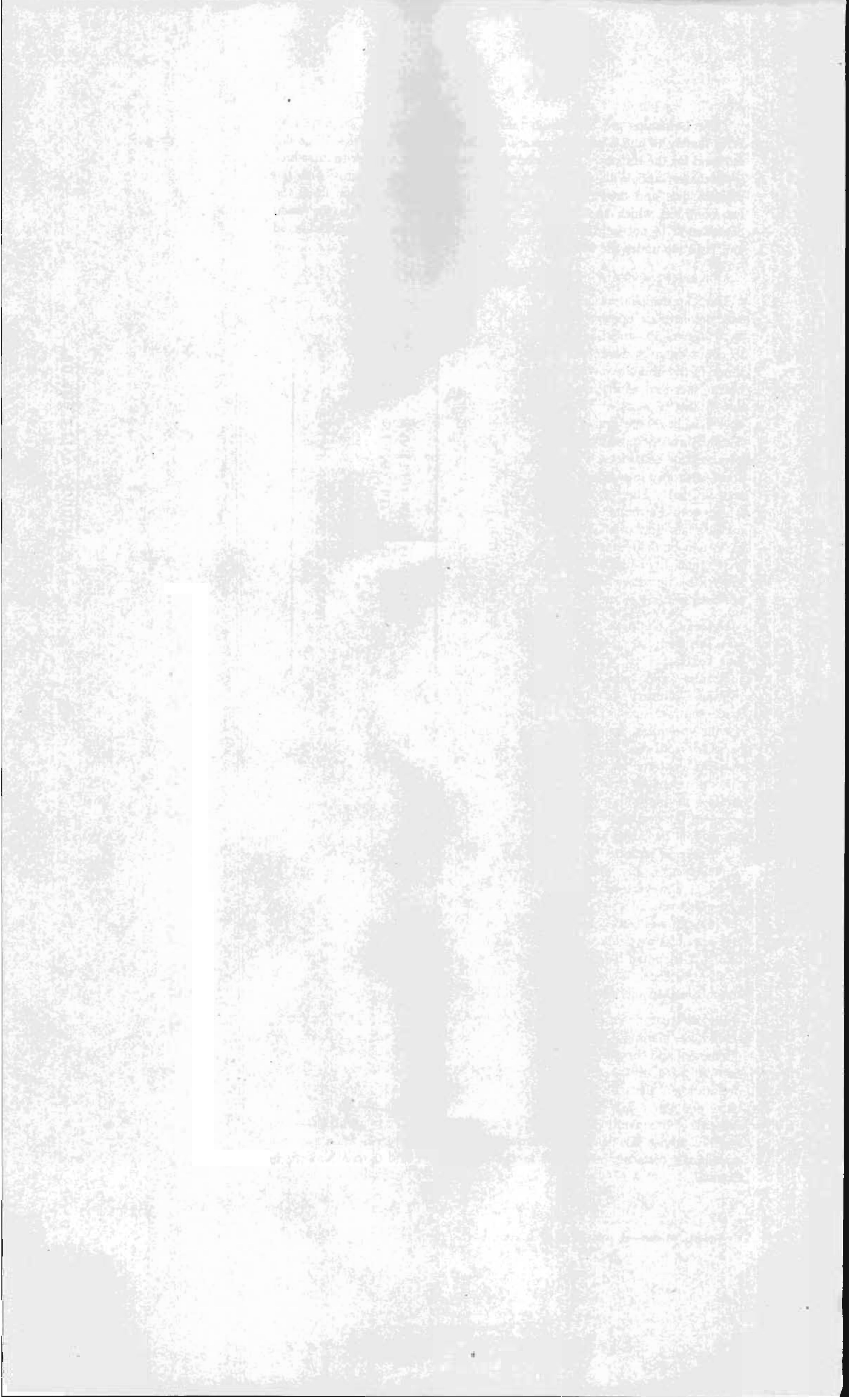
This appeal should accordingly be allowed.

Their Lordships desire to add some further observations. The trial Judge was not in their opinion justified in stating that two separate agreements were drawn up with the intention of concealment, and avoiding a claim to commission in respect of the 20,000 tons. The evidence does not they think justify this view. Two agreements were advisable and were justified by the fact that as originally drawn they commenced to run from different dates; and it was only by reason of an eleventh-hour alteration in the engrossment of the first contract that the commencement dates coincided. Although at first sight the double transaction bears an appearance of questionable behaviour, their Lordships are satisfied that no one concerned acted with any intention of depriving the plaintiff of anything to which he was entitled. Their Lordships also fully appreciate the difficulties under which both Fairhurst and Wills laboured in having, after the lapse of so many years and after a long retirement from business, to give evidence as to one of their many transactions with their various customers. They were, their Lordships feel no doubt, witnesses who were anxious to speak the truth, but they were necessarily in the main dependent upon their previous perusal of such documents as were available.

Reference has been made above to an agreement which was prepared and executed, securing to the plaintiff his commission in respect of the first contract. It was prepared by the solicitors who drafted the coal contracts, and was executed at the end of May, 1920. After reciting (contrary to the fact) that the plaintiff had negotiated the first contract, the defendants thereby covenanted in consideration of the premises to pay him brokerage at the rate of one anna per ton on all coal which should be actually delivered and paid for under the first contract or any agreement substituted therefor. The terms of this document no doubt suggest that his right to commission rests on his services as a negotiator and not as the introducer of a purchaser; but he accepted the document in complete ignorance of the second contract, believing as well he might that the document gave him all he was then entitled to. There is nothing in the document really inconsistent with a claim to commission on any other contract which resulted from his introduction. It may, however, be pointed out that the fact that this special formal agreement was adopted, appears to be inconsistent with the suggestion that the plaintiff was merely employed by a seller of coal as a broker to negotiate and obtain a particular contract for the purchase of a specified amount of coal. If such had been the case the transaction would normally, according to the evidence, have assumed the form of a sold note, under which a commission, specified on its face, would have been payable to the broker.

For the reasons indicated their Lordships are of opinion that this appeal should be allowed. The decree of the 28th February, 1941, should be discharged and the decree of the trial Judge restored but with this alteration, that in place of the declaration therein contained there be substituted a declaration " that the plaintiff is entitled to remuneration at the rate of one anna per ton in respect of all coal delivered and paid for under the said contract subsequently to the said 30th day of June, 1939." They will humbly advise His Majesty accordingly. The respondents must pay the appellant's costs of the appeals to the High Court and to His Majesty in Council.

(26443) Wt. 8226—23 170 6/3 D.L. G. 338



In the Privy Council

VALARSHAK SETH APCAR

v.

THE STANDARD COAL COMPANY
LIMITED AND OTHERS

DELIVERED BY LORD RUSSELL
OF KILLOWEN

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1943