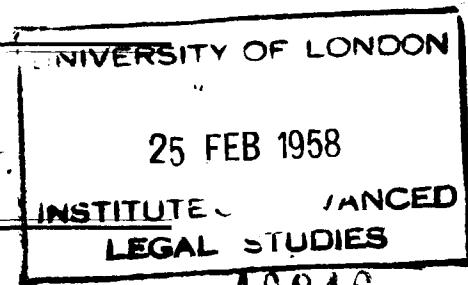


12, 1957

No. 10 of 1956.

In the Privy Council

ON APPEAL FROM THE SUPREME COURT OF CEYLON.



BETWEEN

K. M. PERERA of Morris Street, Kurunegala *Defendant/Appellant*

AND

H. G. MARTIN DIAS of Maharagama Giriulla *Plaintiff/Respondent.*

Case for the Respondent

RECORD.

- 10 1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon dated 4th August 1954 whereby it was decided and decreed, reversing a Judgment and Decree of the District Court of Kurunegala dated 20th March 1950, that the Plaintiff/Respondent was entitled to succeed in his action against the Defendant/Appellant for an account in accordance with his prayer, and to be paid his costs both in the Supreme Court and below. pp. 190-198.
p. 198.
pp. 175-185.
- 20 2. By his plaint dated 30th August 1946 and filed in the District Court of Kurunegala the Plaintiff/Respondent (hereinafter called "the Plaintiff") sued the Defendant/Appellant (hereinafter called "the Defendant") on an oral agreement made on or about 8th April 1943 by the Defendant with the Plaintiff and seven other persons under the terms of which agreement the Plaintiff and the said other persons became severally entitled to receive a certain share of the net profits paid to the Defendant as agency fees for operating a certain motor omnibus service known as the "G" branch of the Sri Lanka Omnibus Company Limited (hereinafter called "Sri Lanka"). The Plaintiff prayed for an account thereof and in default the sum of Rs.22,688.56. pp. 13-15.
p. 14, ll. 28-39.
p. 15, ll. 9-21.
- 30 3. Four of the said persons thereafter filed complaints related to the present action (Exhibits D.27, D.28, D.29 and D.10) which complaints are still pending and awaiting the result of this appeal. p. 32, ll. 5-8.
pp. 262-272.
p. 132, ll. 2-17.
pp. 262, 265, 267, 270.
4. The Defendant at the time of the making of the said agreement was operating the said "G" branch of Sri Lanka as manager on the terms that he should pay monthly to Sri Lanka a sum of Rs.1 per diem p. 123, ll. 19-24.
p. 138, ll. 20-23.
p. 112, ll. 8-31.
p. 21, ll. 20-45.

pp. 234-235. p. 5.
p. 123, ll. 19-24.

as rent for each omnibus and 10 per cent. of the daily gross takings, the Defendant being entitled, so long as he maintained an efficient road omnibus service, to dispose of the remaining income as he pleased.

p. 33, ll. 21-26.
p. 43, ll. 9-11.
p. 228.
p. 20, ll. 31-35.
p. 50, ll. 21-24.

5. The Plaintiff was at all material times operating a certain motor omnibus X 4361 formerly his own property. On 16th January 1943 the Plaintiff transferred this omnibus to Sri Lanka but continued to drive it until it broke down in March 1943.

p. 37, ll. 18-43.
p. 20.
pp. 204-206.
p. 20, ll. 8-18.
p. 26, ll. 23-40.

6. The Defendant, the Plaintiff and the seven other said persons (hereinafter called "the K.A.B. partners") were formerly members of a partnership registered on 20th July 1942 as the K.A.B. Bus Company and formed about the month of April 1942, prior to which the partners were operating their several omnibuses independently of each other on routes between Kurunegala and Allawwa. 10

p. 43, ll. 6-21.
p. 122, ll. 37-40.
p. 111, l. 41-p. 112, l. 30.
p. 29, ll. 15-29.

7. On 15th January 1943 the omnibuses registered in the names of the several partners were assessed as to value and transferred to Sri Lanka. On 12th March 1943 the Directors of Sri Lanka having met the former K.A.B. partners, asked them to work their former vehicles as the "G" branch of Sri Lanka.

p. 28, l. 33-p. 30, l. 34.
p. 112, ll. 12-17.
p. 29, ll. 15-29.
p. 70, l. 28-p. 71, l. 11.
p. 122, ll. 23-29.

8. The case for the Plaintiff was that the Sri Lanka Directors asked the K.A.B. partners to nominate a manager to contract on their behalf with Sri Lanka for running the branch and who would act as the agent of the partners, as Sri Lanka were disinclined to make separate arrangements with each former K.A.B. partner. 20

p. 97, ll. 10-17.
p. 97, ll. 27-32.
p. 71, ll. 1-11.
p. 70, ll. 31-42.

9. The Defendant thereupon agreed to take the appointment of manager and to distribute as their agent the net profits earned by the "G" branch amongst the former K.A.B. partners, each share being proportionate to the assessed value of each former K.A.B. partner's one or more omnibuses. The Defendant was accordingly appointed to the position of manager of the "G" branch on the terms outlined in paragraph 4 hereof by the Board of Sri Lanka. 30

p. 21, ll. 31-42.
p. 30, ll. 3-34.
p. 71, ll. 12-29.
p. 71, ll. 35-42.
p. 30, ll. 14-15.

10. On 8th April 1943 at a meeting convened by him, the Defendant, the Plaintiff and other former K.A.B. partners confirmed and ratified the agreement entered into on 12th March 1943 and the Defendant agreed to pay two-thirds of the net profits of the "G" branch monthly and the remaining one-third annually after certain payments had been met. The Defendant also agreed to hold meetings monthly for the assessments of profits and losses and the distribution of profits. Provision was made to remunerate the Defendant and his clerk for their work.

p. 31, ll. 15-29.
p. 71, ll. 26-29.

11. Thereafter the Defendant held such monthly meetings and distributed the profits as agreed until the month of November 1943, since when he failed to pay the agreed or any profits. 40

p. 16, l. 20-p. 17, l. 3.

12. The Defendant by his Amended Answer denied that the agreement referred to in the preceding paragraph was ever entered into by the parties or that the Plaintiff was entitled to any account.

13. The Defendant further alleged that even if the said agreement were to be proved it would be contrary to law and public policy and therefore unenforceable and he further alleged that the Plaintiff's cause of action was prescribed by law. p. 17, ll. 10-18.
p. 17, ll. 20-21.

14. The issues of illegality and prescription alleged in the preceding paragraph were not seemingly pressed at the hearing of the appeal before the Supreme Court nor were these issues referred to in the Judgment of the Supreme Court and it is to be taken therefore that these issues have been abandoned and will not be raised at the hearing of this appeal. pp. 190-198.

10 15. The fundamental issues in this appeal appear therefore to depend essentially on questions of fact, particularly as derived from admitted documents, and although the hearing extended over a period of eighteen months involving the taking of a mass of evidence, the facts that are in dispute lie within a narrow compass.

16. It is common ground that, as stated in paragraph 6 above, the Plaintiff, the Defendant and the other K.A.B. partners had formed the K.A.B. Bus Co. in or about April 1942 acting on the advice of a Mr. Nelson the then Controller of Transport in Ceylon in order to operate their omnibuses as a combined service on their former routes. The said partnership was, as stated, registered as the K.A.B. Bus Co. and the Defendant was appointed manager thereof by his co-partners as being educationally the best qualified of their number for the appointment. p. 20, ll. 8-10.
p. 67, ll. 1-12.
pp. 204-206.
20 p. 67, ll. 12-17.

17. The Defendant thereafter received the total daily collections from the omnibuses and at meetings of the K.A.B. Co. held monthly for this purpose he accounted for the profits and losses of the previous month's working and distributed the profits to his co-partners in a certain ratio. p. 67, ll. 31-38.
p. 68.

18. On 27th October 1942 the Omnibus Service Licensing Ordinance became law. Under its provisions exclusive route licences had to be applied for and obtained as a condition precedent to operating a public omnibus service on any route after 1st January 1943. 30

19. On 12th December 1942 at a meeting of the K.A.B. partners the Defendant was instructed to apply for the necessary licences and at a further meeting on 2nd January 1943 the Defendant reported that exclusive route licences for the routes on which the K.A.B. Bus Co. operated had already been given to Sri Lanka. p. 20, l. 6-24.
p. 69, ll. 22-27.
p. 69, ll. 31-46.
p. 151, ll. 4-11.

20. On 15th January 1943 the omnibuses belonging to the K.A.B. partners were valued by an official of Sri Lanka and transferred to that company, the individual partners thereafter receiving as consideration shares in Sri Lanka in a nominal amount equal to the assessed value of their former omnibuses and goodwill, the Plaintiff receiving credit for Rs.2,250, for which he received later 25 Ordinary shares of Sri Lanka. p. 27, ll. 29-31.
40 p. 43, ll. 34-35.

21. The K.A.B. partners, however, continued to operate the omnibuses so transferred to Sri Lanka on the same routes as previously and the Defendant continued to act as manager. p. 43, ll. 9-11.

p. 232.

22. On 1st February 1943 the name of the K.A.B. Bus Co. was removed from the Register of Business Names (D.17).

p. 21, ll. 20-31.

p. 29, ll. 15-29.

p. 70, ll. 23-30.

p. 29, l. 15-p. 30, l. 34.

p. 70, l. 23-p. 71, l. 11.

p. 136, l. 42-p. 138, l. 7.

p. 29, ll. 15-32.

23. On 12th March 1943 all the former K.A.B. partners including the Plaintiff and the Defendant attended a conference with the Directors of Sri Lanka. The Chairman of Sri Lanka informed them that his Board wished to make arrangements for running the former K.A.B. buses on the former K.A.B. routes and with that object were prepared to accept one of their number to act as manager of a new branch to be called the "G" branch created for this purpose. The manager so appointed would be required to pay Rs.1 per diem rent for each omnibus and 10% of the gross takings, and as to the remainder of the moneys received, Sri Lanka were not concerned so long as an adequate transport service was provided to the public. The Board were unwilling to contract individually with the nine persons to run their former bus or buses and offered each former K.A.B. member in turn the opportunity of becoming manager of the "G" branch. All having refused to undertake the appointment of manager, the Chairman explained that if no one of their number could undertake the management, it might become necessary to appoint an outsider and there was a danger that in this case the employees of the "G" branch might lose their employment.

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p. 29, ll. 15-29.

p. 70, ll. 23-42.

p. 97, ll. 6-32.

24. It is at this point that the crucial differences between the respective versions of the Plaintiff and the Defendant occur. It is the case for the Plaintiff that the Defendant agreed to accept nomination by his former partners for the appointment of manager of the "G" branch in order to contract directly with the Board of Sri Lanka on their behalf, to pay the rent for the buses and 10% of the gross takings to Sri Lanka and to divide thereafter at monthly meetings held for the purpose the net profits amongst the former partners in a certain ratio. On this understanding and on the nomination of the former K.A.B. partners the Sri Lanka Board then appointed the Defendant manager of the "G" branch.

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p. 236, ll. 1-15.

p. 30, ll. 3-34.

p. 71, ll. 35-41.

p. 71, ll. 12-29.

25. On 8th April 1943 the Defendant, the Plaintiff and the other former partners attended a meeting of the "G" branch at Kurunegala called by the Defendant (P.6) when the first distribution of profits earned by the "G" branch was made to them by the Defendant. At this meeting the parties ratified the arrangement come to on 12th March 1943 and it was agreed to give the Defendant a salary of Rs.100 per mensem and to his clerk a salary of Rs.75 per mensem for acting as agent and clerk of the former K.A.B. partners, whilst at the same time the Defendant entered into an oral agreement with the Plaintiff and the other former partners as follows: two-thirds of the net profits from the working of the "G" branch would be distributed monthly amongst the former K.A.B. partners in proportion to the value of their former buses as assessed by Sri Lanka when the vehicles were taken over, and one-third of the monthly profits would be held in reserve to be divided annually after extraordinary expenditures had been met. The Defendant furthermore agreed to distribute the profits monthly at special meetings held for the purpose.

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p. 31, ll. 15-29.

p. 71, ll. 12-29.

26. The Defendant held these monthly meetings thereafter for the division of profits and examination of the accounts until the month of

November 1943 since which date the Defendant withheld the share of the profits of the former K.A.B. partners (including that due to the Plaintiff) and failed to hold the requisite meetings to examine the accounts of the branch. p. 71, ll. 27-29.

27. It was the case for the Plaintiff that at the meeting of the K.A.B. partners on 12th December 1942 the question of applying for the exclusive route licences came under discussion and that the Defendant was instructed to make application for licences to the appropriate authority. It is significant that, despite the urgent necessity of obtaining the requisite licences if the K.A.B. partners were to operate their buses after 31st December 1942, the Defendant took no steps, to use his own words, "to bother to find out when the exclusive licence system would be enforced," and although he did make application for nine licences, he delayed doing so until 31st December 1942, seven days after the last date available for applying for the licences. He thereafter endorsed the application: "Application withdrawn to be re-submitted through Sri Lanka." The Defendant alleged that the endorsement was made at the behest of his partners. p. 20, ll. 14-20.
p. 150, ll. 36-37.
p. 151, ll. 12-28.
p. 150, ll. 41-44.
p. 65, ll. 8-16.
p. 151, ll. 2-28.

28. On 2nd January 1943 the Defendant at a meeting of the K.A.B. partners specially convened by him explained the situation, saying that Sri Lanka had been granted the exclusive licences, and that there had been no other application for a licence. It was the case for the Plaintiff that the Defendant explained to the partners that they could operate as before by transferring their buses to Sri Lanka and paying a rent of Rs.1 per diem per bus and 10% of the gross takings, retaining the balance for themselves. p. 69, ll. 22-37.
p. 40, ll. 32-45.
p. 60, l. 31-p. 70, l. 4.
p. 85, ll. 9-26.

29. The Plaintiff and Appuhamy, the latter a K.A.B. partner and a bus driver in the "G" branch, gave evidence at the trial in the District Court in the sense already indicated. pp. 29-64.
pp. 71-102.

30. Chandradasa, a bank clerk, gave evidence as to the drawing of a cheque No. 2015828 dated 5.10.43 in favour of bearer for Rs.437.62 by K. A. M. Perera. The Defendant denied giving this cheque to one Romiel Dias, a former K.A.B. partner since deceased. It was the contention of the Plaintiff that Romiel Dias, a former K.A.B. partner, had received this cheque as his share of profits in October 1943. p. 64, l. 31.
p. 65, l. 5.
p. 159, ll. 1-10.

31. Mendis, a clerk in the office of the Commissioner of Motor Transport, Colombo, gave evidence that the Defendant had lodged nine applications (P.13-P.19) for route licences on 31st December 1942 as Managing Director of the K.A.B. Bus Co. Each application was endorsed withdrawn by K. M. Perera for re-submission through Sri Lanka. One such endorsement (P.19) is dated 5.1.43. pp. 65-66.
pp. 210, 212, 215, 217,
220, 223, 225.
p. 65, ll. 41-43.

32. It was the case for the Defendant, and the Defendant himself gave evidence to the effect that what occurred at the conference on 12th March 1943 when he and each of the former partners had refused to accept the office of manager, was that the Directors of Sri Lanka explained that if no one of the former K.A.B. partners was prepared to accept the post of manager, it would be necessary to appoint an outsider who might p. 137, ll. 6-21.
p. 112, ll. 8-32.
p. 123, ll. 14-24.
p. 137, ll. 24-39.
p. 234, l. 27.
p. 235, l. 21.
p. 108, ll. 27-36.

dismiss the Plaintiff and the other former K.A.B. partners from their employment in the " G " branch ; and that it was in these circumstances and at the insistence of his former partners that the Defendant came to be appointed manager by Sri Lanka of their " G " branch independently of any nomination or consent of his former partners ; that he took upon himself the responsibility of running the " G " branch at his own risk and on the terms of his appointment by Sri Lanka as manager, receiving no salary therefor but keeping as his remuneration all net profits after paying all outgoings, a rent of Rs.1 per bus per diem and 10% of the gross profits to Sri Lanka. He expressly denied that any such oral agreement 10 as is relied upon by the Respondent was ever made.

33. The Defendant furthermore denied that he had at any time suggested to the K.A.B. partners the advisability of joining Sri Lanka or that he had ever suggested that it would be possible to continue to operate their buses on a profit basis substantially as before. The Defendant furthermore alleged that he himself had at first wished to claim compensation from Sri Lanka and to relinquish operating motor omnibuses altogether ; that at the meeting of 2nd January 1943 the Plaintiff and his former K.A.B. partners had suggested making application for route licences through Sri Lanka and that he had agreed to this course, and in order to 20 effect it had later withdrawn the applications made by him on 31st December 1942 in order that they should be re-submitted through Sri Lanka to the Commissioner of Motor Transport ; that he had been asked to join Sri Lanka but had said he was considering claiming compensation. When asked to accept the management of the " G " branch, he had refused, but had, until Sri Lanka made a decision, operated the omnibuses including his own which he had transferred. The Defendant also alleged that it was in order to help his former associates to keep their jobs that he had consented to take on the managership of the " G " branch and that he himself had been loath to accept the appointment. 30

34. As regards the meeting of 8th April 1943, the Defendant denied that he had made the agreement alleged by the Plaintiff or any agreement. He alleged that the meetings summoned by the letters P.5, P.7, P.8, P.26, P.27 and P.28, were in no way concerned with the distribution of profits but with a matter of wages and were convened to ask the " G " branch employees to do better work.

35. The Defendant further alleged that he did make certain *ex gratia* payments to some of his employees in order to encourage them to more vigorous effort. The Defendant alleged that he addressed his employees and not his colleagues and equals when he summoned them in the terms 40 used in P.7, P.8, P.26, P.27 and P.28 to receive the *ex gratia* payments ; that the reference to " losses " in these letters was because he had explained this matter to the Plaintiff and other workers summoned, warning them that if there were losses in any month the recipients would have to return to him these *ex gratia* payments.

36. The Defendant agreed that these monthly payments ceased altogether after October 1943 in consequence of it having been explained to him by a Director of Sri Lanka, the witness Madanayake, that he would shortly be required to purchase certain replacement machinery for the

“ G ” branch, and that unless the Defendant kept adequate reserves and were able to find the money to purchase the new material, he might jeopardise his appointment as manager.

37. It is the case for the Plaintiff that this astonishing explanation, which was never even put to the Plaintiff at the trial in the District Court, is totally unsatisfactory and unworthy of belief. The series of letters referred to in paragraph 35 hereof, which are signed by the Defendant and addressed to his former partners, some of whom were not working in any way for Sri Lanka, seem to make this explanation impossible. The letters invite the recipients to meetings to consider the accounts of the “ G ” branch and use such expressions as “ to divide the profit and loss of this branch.” P.8 may be taken as a typical example ; it is in the following terms :—

“ Gentleman,

“ As a meeting for the distribution of the profit and loss of this branch for the month of July, 1943, will be held on the 20th instant at 10 a.m., your presence is essential.

“ SRI LANKA OMNIBUS Co., LTD.,

“ (Sgd.) K. M. PERERA,

“ Manager, Branch “ G,” Kurunegala.”

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It is submitted that the phraseology used in the above and the other letters referred to in paragraph 35 is inconsistent with the relationship of employer and servant which the Defendant sought to establish.

38. The Defendant’s version of the reason for the formation of the K.A.B. Bus Co. is in conflict with that which must generally have been known to every bus operator in Ceylon in 1942. In cross-examination he said : “ Prior to December 1942 I did not know that bus owners had to form themselves into limited liability companies or to apply for route licences or that exclusive route licences would be given only to limited liability companies. I knew nothing about the Motor Omnibus Licensing Ordinance until December 1942.” Shown P.22, a letter sent to the K.A.B. partners on 2nd October 1942 by the Defendant regarding the necessity of organizing a limited company under the new Ordinance, he admitted that he must have known of the said Ordinance and of the exclusive route licences in October but that he had no recollection of it. The Defendant denied that he was trying at any time to organize the K.A.B. Bus Co. into a limited company for the purpose of obtaining route licences. This appears indeed to have been the case, although he seems to have given, and probably intended to give his co-partners, who had entrusted their interests to him as an educated man and as their manager, no hint of this intention.

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39. It is indisputable that the Nelson Scheme, as it was called after the distinguished English expert in passenger transport by road who was invited to Ceylon to advise on the problems of omnibus services, involved the introduction of exclusive route licences as from 1st January 1943 and the elimination thereby of the wasteful and inefficient competition which had theretofore prevailed. This inevitably involved that small

private operators, many with only a single owner driven omnibus, had to embark on some form of merger if they were to stand any chance of obtaining for any route an exclusive route licence.

p. 149, ll. 1-36.
p. 26, ll. 26-28.
p. 115, ll. 1-30.
p. 158, ll. 12-24.
p. 150, ll. 20-45.

40. In view of the Defendant's admission that he had attended conferences given by Mr. Nelson and made arrangements for other such conferences in the spring and summer of 1942; that he had operated omnibuses as manager during the whole period from April 1942 until the K.A.B. Bus Co. venture was absorbed by Sri Lanka in 1943; that he was a man of superior education, it seems almost unbelievable that as manager of the K.A.B. Bus Co. he could have remained in ignorance of the details of the Nelson Scheme and of the very serious results on the fate of the partnership of his failure even to apply for the necessary licences in proper time. 10

p. 145, ll. 1-20.
p. 67, l. 32-p. 68, l. 8.
p. 133, ll. 20-41.
p. 145, ll. 1-20.
p. 144, ll. 16-35.

41. In another part of his evidence the Defendant alleged that on the formation of the K.A.B. Bus Co. the partners received their profits on a scale proportional to the earnings of their bus or buses, and not in proportion to the assessed value of the partners' buses at the inception of the partnership, as was stated for the Plaintiff. These matters could have doubtless been substantiated, if true, by the production of the K.A.B. Bus Co. books, which were admittedly in the Defendant's custody. According to the Defendant these books had been lost in circumstances which were never explained. 20

p. 132, ll. 20-27.
p. 139, ll. 5-15.
p. 125, l. 28-p. 126, l. 28.
p. 126, ll. 24-28.

42. A similar fate, in circumstances even more suspicious, appears to have befallen the books of the "G" branch of Sri Lanka relating to the period under review in 1943. These books would have clearly shown the nature of the *ex gratia* payments that the Defendant alleged he was making to his so-called employees.

pp. 109-126.
p. 111, ll. 12-35.
p. 112, ll. 8-32.
p. 113, ll. 13-31.

43. Madanayake, a Director of Sri Lanka, gave evidence of the circumstances of the meeting on 12th March 1943. It is submitted that the effect of this evidence did little one way or the other to support the version of that meeting furnished by the Defendant. This witness did, however, repeat the account of his interview with the Defendant and of the advice given by him to the Defendant on the subject of *ex gratia* payments referred to above. 30

pp. 102-108.

44. V. L. A. Perera, General Manager and Secretary of Sri Lanka, produced various documents from the archives of Sri Lanka.

pp. 125-126.
p. 125, l. 28.
p. 126, l. 4.

45. Thiagarajah, an accountant of Sri Lanka, testified that the book containing the agency fees of the Defendant from 16th January 1943 to 31st March 1943 had been sent to him by the Defendant and by the witness to the company's accountants, Messrs. Terrence Perera & Co., who according to their witness denied that they had ever received the said books. The same fate appears to have overtaken similar books for the year 1944-1945 when sent for auditing. 40

p. 132, ll. 27-29.

pp. 127-131.

46. Samarasinghe, a Director of Sri Lanka since 1944 and manager of their "F" branch, gave evidence to the effect that his conditions of service were similar to those existing in the "G" branch of the company and that as manager, having paid a rent of Rs.1 per bus per day, he received 90% of the gross takings, from which he had to pay all

expenditures in running the buses, should purchase new buses and maintain an adequate service. He was, he said, entitled to keep the remainder. It appears evident from the slender rate of dividend paid by Sri Lanka to their shareholders that the respective branch managers looked to their agency fees and not to the dividend for their real remuneration for their work and in most cases for the goodwill of their former businesses.

pp. 127-131.

p. 256, ll. 39-40.

p. 341, ll. 1-9.

47. The hearing of the action was begun in the District Court of Kuruncgala on 27th May 1948 when twenty-five and three supplementary issues were framed. Evidence was thereafter taken on this occasion and on numerous dates until 15th December 1949.

p. 17, l. 27-p. 20, l. 40.

p. 24, l. 25-p. 26, l. 20.

48. On 20th March 1950 the learned District Court Judge delivered a reserved Judgment in which he accepted the evidence of the Defendant and his witnesses and rejected as unreliable the evidence led for the Plaintiff. It is pertinent to remark that the trial was a protracted one and that a large mass of irrelevant evidence was gone into. The Plaintiff and the witness Appuhamy were subjected to a very long, severe and rambling cross-examination, in the course of which the Plaintiff undoubtedly contradicted himself on a number of points. In one instance, indeed, he denied having suffered a term of imprisonment for manslaughter occasioned by careless driving on the highway, but which he subsequently admitted. It is submitted that neither the Plaintiff nor his witness Appuhamy were shaken neither on the material point as to the Defendant's oral agreement to distribute the profits of the "G" branch, nor on the facts leading up to it. On the other hand, the learned District Court Judge does not seem to have attached sufficient importance to the obvious improbabilities in the Defendant's evidence. The Defendant's assertion that he knew nothing of the impending introduction of a system of exclusive licences until December 1942 is, in the light of the admitted facts, quite incredible. Again, the strange explanation given by the Defendant as to his reason for calling meetings of the former partners in the terms of the letters P.25-P.29 was never put to the Plaintiff at all. Furthermore, the learned Judge seems to have paid insufficient attention to the obvious implications of the documentary evidence. The account given by the learned Judge in his Judgment of the circumstances in which the Defendant was offered and accepted the appointment of manager of the "G" branch at the meeting on 12th March 1943 between the Directors of Sri Lanka and the former K.A.B. partners appears to be quite at variance with the Judge's own note of the evidence called by the Defendant. The learned Judge appears to have thought that, once the Defendant declined the appointment of manager, the K.A.B. partners were given to understand by the Board of Sri Lanka that unless the Defendant could be got to change his mind it would be necessary to employ a manager from outside who might dismiss them from their posts as drivers and inspectors. Actually it is freely admitted in the evidence led for the Defendant that Sri Lanka were prepared to accept any one of the former K.A.B. partners as manager of the "G" branch on the same terms that were accepted by the Defendant; Sri Lanka were even willing to contract with the former partners jointly provided that one of their number should be appointed manager and be responsible to Sri Lanka for running an efficient service and paying the sums due to the company.

p. 175, l. 36.

p. 46, ll. 8-18.

p. 158, ll. 12-31.

p. 149.

pp. 155-157.

pp. 236, 237, 239, 240.

p. 92.

p. 112, ll. 8-20.

p. 137, ll. 4-21.

p. 180, ll. 21-32.

p. 137, ll. 10-13.

49. The learned Judge incorporated and answered in his Judgment the issues framed at the trial, answering No. 7 (A) and (B) in the negative. It is difficult to see how he could have arrived at this conclusion in view of the evidence led for both sides. It is noteworthy that the learned Judge accepted the strange explanation furnished by the Defendant of how the letters P.5, P.7, P.26, P.43, P.28 and P.29 came to be written. The implication of the tenor of these letters is considered at length in the Judgment of the Supreme Court. It is the respectful submission of the Plaintiff that the said letters can bear no reasonable interpretation other than that the Defendant had entered into just such an agreement with the Plaintiff and his former partners as is alleged in the case for the Plaintiff. 10

50. The learned District Court Judge, having answered the issues, dismissed the Plaintiff's action with costs and a Decree of the said Court was entered accordingly.

51. The Plaintiff duly appealed to the Supreme Court from the said Judgment and Decree of the District Court of Kurunegala. The grounds of the appeal are set out in his Petition dated 29th March 1950 which is contained in the Record.

52. On the hearing of the said appeal the leading Judgment of the Supreme Court, with which Sansoni, J., concurred, was delivered by Rose, C.J. The learned Chief Justice indicated that the question at issue resolved itself into a question of fact and as to which version of the facts should be believed; the learned District Court Judge had considered the Plaintiff's evidence untruthful and accepted in substance the evidence of the Defendant. In consequence it had been contended for the Defendant that that should be the end of the matter. The learned Chief Justice then went on to say that over a long cross-examination which strayed over a very wide field the Plaintiff may well have given answers which were untrue or unreliable. He added: "The question, however, which this Court has to consider is not whether the Plaintiff is a truthful person but whether on the relatively narrow ground of the existence of the alleged agreement with the Plaintiff, his story, in the light of the documents and of the probabilities of the case, should or should not be accepted." 20 30

53. Rose, C.J., then proceeded to a penetrating analysis of the oral and particularly of the documentary evidence in the case in order to ascertain whether, in the light thereof and of the inherent probabilities, the explanation given by the Defendant could reasonably be true.

54. The Judgment extends from page 186-197 of the printed Record and the Plaintiff will rely upon it in its entirety and will support it for the reasons contained therein. 40

55. The learned Chief Justice concluded his survey of the evidence by saying: "The documents which have been produced in this case are, in my opinion, inconsistent with the Defendant's position, and consistent only with some such arrangement as is alleged by the Plaintiff.

56. Having remarked that, apart from the documents, the probabilities of the matter seemed to him to favour the Plaintiff's version, the learned Judge drew attention to the fact that the Defendant had failed

to produce documents formerly in his custody and now stated to have been unfortunately mislaid, which must have thrown light upon the arrangement between the parties and substantiated the Defendant's denial, had it been true, of the alleged agreement.

57. In accordance with this Judgment the Supreme Court allowed the appeal, set aside the Judgment and Decree of the District Court, and granted the Plaintiff's prayer for an account to be taken and remitted the case to the District Court accordingly.

58. A Decree of the Supreme Court dated 4th August 1950 was p. 198.
10 drawn up and entered accordingly.

59. The Defendant on the 8th September 1954 obtained conditional p. 200.
leave to appeal to Her Majesty in Council from the said Judgment and Decree of the Supreme Court of Ceylon and this leave was made final on p. 201.
the 12th November 1954.

60. The Plaintiff respectfully submits that the appeal should be dismissed and the said Judgment and Decree of the Supreme Court of Ceylon affirmed with costs for the following amongst other

REASONS

- 20
- (1) BECAUSE the inherent probabilities, in all the circumstances prevailing at the material time, were consistent with the Plaintiff's case and inconsistent with the answers set up by the Defendant.
- (2) BECAUSE the District Court Judge of Kurunegala failed to appreciate adequately that the contemporary documents supported the Plaintiff's case and were not reconcilable with the case set up by the Defendant.
- (3) BECAUSE in the light of the contemporary documents the oral evidence of the Defendant could not reasonably be accepted as reliable or true.
- 30
- (4) BECAUSE the District Court Judge in his Judgment misdirected himself in important respects as to the effect of the oral evidence.
- (5) BECAUSE the District Court Judge of Kurunegala attached undue importance to certain unreliable answers given by the Respondent and his witness Appuhamy on matters which were irrelevant.
- (6) BECAUSE the Judgment of the Supreme Court was right and ought to be affirmed.
- 40
- (7) BECAUSE the Judgment of the District Court was wrong and cannot be supported.

STEPHEN CHAPMAN.

ROBERT N. HALES.

In the Privy Council

ON APPEAL
from the Supreme Court of Ceylon.

BETWEEN

K. M. PERERA . . . *Defendant*
Appellant

AND

H. G. MARTIN DIAS . . . *Plaintiff*
Respondent.

Case for the Respondent

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Respondent's Solicitors.