

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Maung Shwe Oh and another v. Maung Tun Gyaw and another, from the Chief Court of Lower Burma ; delivered the 26th July 1904.

Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The action out of which this Appeal arises was brought by the Appellants against the Respondents for recovery of a sum of Rs. 35,000 and interest, and (in substance) damages, for breach of a contract alleged to have been made with the Appellants by the first Respondent either on his own behalf or on behalf of himself and the second Respondent. The Courts below have given the Appellants judgment for the sum claimed, with interest, but have held them not entitled to the other relief sought. The only question therefore before their Lordships is whether the Appellants are also entitled to damages for breach of the alleged contract.

In order to understand the questions in issue between the parties it will be convenient to state shortly the relation in which the parties stood to each other, and the circumstances which led up to the transaction in question. All the parties are engaged in the timber trade in Burma and Siam. The Appellants are brothers and co-partners. The first Respondent is an uncle

of the Appellants, and the second Respondent is his son. For some time prior to the 2nd July 1897 (the English date of the alleged contract) the first Respondent had been in the habit of borrowing large sums of money from the Appellants for the purpose of his business, and by a deed dated the 24th September 1895 had mortgaged his stock of timber, the elephants employed by him in the forests, and other property to the first Appellant for three lakhs of rupees. The first Respondent resided and conducted his business at Moulmein, and the second Respondent, under a power of attorney from him, was working certain timber forests in Siam as his agent. Previously to and in the year 1896 the Appellants were working timber in a forest called Maungpai, in Siam, under a permit from the lessee, one Payataga Kannah. But in the course of that year Kannah died, and his and the Appellants' rights in the forest thereupon determined. The Appellants on hearing of Kannah's death immediately instructed one Maung Shwe Yin, his local agent at Zimmai, the capital of the State in which the forest was situate, to apply for a six years' lease of it. The second Respondent, who was in the country, also applied for the Maungpai forest, apparently through the same agent, and obtained a grant of it in his own name. In some way, which is not very clearly explained, a sum of Rs. 15,000 belonging to the Appellants, which was under Maung Shwe Yin's control, was advanced to the second Respondent for the purpose of being used by him in part payment of the expenses of obtaining the grant of Maungpai. The second Respondent informed his father that he had obtained the grant of the forest, and by a subsequent letter dated the 18th May 1897, that he had to pay Rs. 70,000 for the expenses of obtaining it, which sum he

requested his father to send him. It also appears that a company called the Burma Trading Corporation were anxious to obtain rights in the forest, and had opened negotiations with the second Respondent for the purpose. The breach relied on is a subsequent agreement made by the second Respondent with this Company.

In these circumstances the first Respondent applied to the first Appellant and one Paya-taga Ko Na Ouk to advance him the sum of Rs. 70,000 (including the Rs. 15,000 already advanced at Zimmai) which they agreed to do in equal shares on the terms of the letter of the 2nd July 1897 which is relied on by the Appellants as the contract in suit. That letter is as follows:—

“ To
 “ Nephew Maung Shwe Oh and Paya-taga Ko Na Ouk.
 “ For the written permit obtained for the Maungpai forest
 “ in the Zimmai jurisdiction for six years, my son Maung
 “ Shwe Hle had to pay the owner of the forest Rs. 65,000 as
 “ a present. The total of the various expenses incurred was
 “ Rs. 5,000 making in all Rs. 70,000. The amount already
 “ taken by Maung Shwe Hle from Maung Shwe Yin, the
 “ agent of nephew Maung Shwe Oh at Zimmai was Rs. 15 000.
 “ A letter dated the 3rd Waning of Kason 1259 B.E. (18-5-
 “ 1897) from my son Maung Shwe Hle asking me to send
 “ balance Rs. 55,000 soon was brought to me. I was unable
 “ to send the money. Will you, nephew and Paya-taga,
 “ kindly pay half each. For so paying, I will not allow my
 “ son Maung Shwe Hle to let out the Maungpai forest or
 “ permit any person to fell (timber) within the period of six
 “ years for which written permit has been obtained for the
 “ forest; for he (my son Maung Shwe Hle) had obtained the
 “ written permit for the forest while acting as my agent.
 “ When Maung Shwe Hle returns to his original abode, Kaw
 “ Hnut village, I will make him to arrange for you, nephew
 “ and Paya-taga, in some way or other (or by any means) to
 “ go on working the forest within the years for which written
 “ permit has been obtained. *If after the said business has*
 “ *been arranged, should any (of you) be dissatisfied (or dis-*
 “ *agree)* I and my son Maung Shwe Hle will pay the Rs. 55,000
 “ now advanced and the aforesaid sum of Rs. 15,000 with
 “ interest due from the date of the advance to the date of
 “ re-payment at the rate of Rs. 2 per cent. per mensem.
 “ (We) will pay the principal and interest on the day on
 “ which they may be required. So please pay me the said
 “ sum of Rs. 55,000 so as to enable me to send the same to

“ my son Maung Shwe Hle. I and my son Maung Shwe Hle
 “ will hold ourselves responsible for the sums advanced.

“ MAUNG TUN GYAW.

“ Kaw Hnut Village.

“ Dated the 4th Waxing of Waso, 1259 B.E. (2-7-97).

“ Witness.

“ Maung Shwe Hle's mother.”

The learned District Judge certifies that the *perfect* English translation of the words in italics is:—

“ If in making the allotment of places for
 “ working in this way, there is any
 “ disagreement”

and their Lordships will so read it.

The Respondents say that the second Respondent was the only person interested in the permit to work the Maungpai forest, and as he was not a party to the alleged contract, there is no effective agreement. In answer to this argument it was contended in the Courts below that the Respondents were partners in the timber trade and the contract was in the course of the partnership business. Both the District Judge, by whom the suit was heard in the first instance, and the learned Judges in the Chief Court on appeal decided this issue in favour of the Respondents and it was not raised before their Lordships. It was then contended that the second Respondent acted as the agent of the first Respondent only in obtaining the permit to work the Maungpai forest, and that the latter was the only person entitled to the benefit of the permit. The evidence in support of this issue relied on by the Appellants consisted mainly of the inferences to be drawn from the relation of the Respondents to each other, the fact of the second Respondent being a person without means and the funds required being obtained on the credit of the first Respondent, the contents of certain letters written by the Respondent, and the language of the document of the 2nd July 1897 itself. On this issue also there is a

concurrent finding by both Courts against the Appellants, but as the question depends partly on the construction to be put on written instruments, their Lordships thought fit to hear the argument upon it.

It is no doubt a case of some suspicion, and there are expressions in the correspondence which are quoted by Counsel on each side as being in their favour. A copy only of the letter of the 18th May 1897, was put in evidence, but it was accepted by both Courts as a true copy, and if so, it certainly supports the Respondents' view that the second Respondent obtained the permit on his own behalf only. As their Lordships agree with the concurrent finding on this issue also of the Courts below, they do not think it necessary to discuss the letters in detail.

It remains to consider the contents of the document itself. It does not say that the second Respondent had obtained the permit as agent for his father, but had done so while acting as his father's agent, which is true. The expressions chiefly relied on for the purpose of showing agency were the words "I will not allow my son to let out the Maungpai forest," &c., and "when Maung Shwe Hle returns . . . I will make him arrange." This language does not seem to mean more than "I will cause" or "induce." In any case the letter is not evidence against the second Respondent and could at most prove only the impression or belief of the first Respondent. Their Lordships are of opinion that it is not proved that the second Respondent obtained the permit for the Maungpai forest as agent for the first Respondent. But quite independently of this question they think that the Appeal fails on the ground that the terms of the proposed contract do not appear from the document, and that according to its true construction it contemplated only the

making of a contract on the return home of the second Respondent, and left all terms to be then arranged. The allotment of the forest between the Appellants and Ko Na Ouk was expressly left for future arrangement, and the terms as to royalty or otherwise on which the forest was to be worked were also left open. "I will make him arrange for you in some way or other to go on working." The first Appellant indeed said that the rates were verbally arranged at the same time. But that is not confirmed by the first Respondent or by Ko Na Ouk, who may be treated as an independent witness, and cannot be accepted as proved. If it were proved it is at least doubtful whether the evidence would be admissible under Section 91 of the Indian Evidence Act.

Their Lordships are of opinion that according to the true construction of the document the only bargain was that the Appellants and Ko Na Ouk should be allowed to work the forest if they succeeded in making an arrangement to that effect with the second Respondent, and if they failed to do so they were to get their money back with interest. This is how Ko Na Ouk says he understood it, and their Lordships think he was right.

Their Lordships will therefore humbly advise His Majesty that the Appeal be dismissed, and the Appellants will pay the costs of it.
