Privy Council Appeal No. 36 *of* 1923.

Tan Soo Hock - - - - - - - - *Appellant*

v.

Tan Jiak Choo and others - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH AUGUST, 1924.

Present at the Hearing:

LORD DUNEDIN.
LORD SHAW.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* LORD CARSON.]

The appellant, Tan Soo Hock, and his brother, Tan Soo Ghi, brought an action in the Supreme Court of the Straits Settlements (Settlement of Malacca) against the respondent, Tan Jiak Choo, in his personal capacity, and also against the said Tan Jiak Choo and Chua Poh Eng as executors of Chua Poh Swi, deceased, claiming a declaration that they and the said Chua Poh Swi were partners with the said Tan Jiak Choo of the business of owning and working a certain estate known as the Ujong Padang Estate in Malacca and for an account. The existence of any such partnership was denied by the said respondent, and the sole question in the case was one of fact.

The case was heard before Mr. Justice Sproule and judgment was given by him in the plaintiffs' favour on the 28th July, 1921. From that judgment the respondent, Tan Jiak Choo, appealed to the Court of Appeal of the Straits Settlements (Settlement of Singapore) who, on the 21st January, 1922, by a majority (Shaw C.J. dissenting) made an order allowing the appeal. The present

appeal in which Tan Soo Hock is the sole appellant, seeks to set aside this order and to restore the judgment of Mr. Justice Sproule. As the question to be determined is one of fact it must, of course, be borne in mind that the Trial Judge had the advantage of seeing and hearing the witnesses and is admittedly a Judge well acquainted during the whole of his career with Oriental people and their mentality. Stated broadly, the case of the respondent is that the Trial Judge attached undue importance to certain fabricated books which will be dealt with later, and drew inferences in the appellant's favour which were not justified, and further that there was no evidence to justify the finding of Mr. Justice Sproule.

It is necessary, before considering the evidence produced on behalf of the appellant and his co-plaintiff, to consider who the parties are and their relationship to each other. The appellant and Tan Soo Ghi are brothers living in Malacca and are nephews of the respondent Tan Jiak Choo. They are all three members of the Tan family which, in the words of Mr. Justice Sproule, is "perhaps the wealthiest and most powerful Straits born Chinese family in the peninsula." The respondent Tan Jiak Choo is the head of the Malacca branch of the Tan family and is apparently very wealthy. Chua Poh Swi, who died on 21st November, 1911, was the brother-in-law of the respondent Tan Jiak Choo and brother of Chua Poh Eng, both of whom were appointed executors of Chua Poh Swi's will, of which probate was granted on 21st May, 1912. The appellant and his co-plaintiff lived and carried on business in Malacca, the one as a broker, and the other as a planter, and both were interested in rubber properties at the material times with which we are dealing, a period during which there was a considerable boom in the purchase of rubber estates.

It was stated by the appellant in evidence that in July, 1909, he spotted a small property of 20 acres at Sungei Bahru in Malacca, for the purchase of which he entered into negotiations. In the same month he left Malacca and travelled by Straits steamship to Singapore, and on board the same ship were his uncle, the respondent Tan Jiak Choo, and Chua Poh Swi, who all three went to stay at the house in Singapore of a relative Tan Jiak Kim. Whilst there on 19th July, he received a cable from Wee Cheng Tiow which is exhibited and is in the following terms :—

> "My rubber plantation at Sungei Bahru Hilir certainly I must sell to you at price $10,000 as I agreed before Master Gomes and Soo Ghi its size 44 acres."

He told Chua Poh Swi of this cable and also about other neighbouring properties he and his brother would wish to buy. The matter was then discussed with the respondent Tan Jiak Choo, his uncle, who agreed to finance the enterprise. On his return to Malacca the appellant inspected the land with his brother, Chua Poh Swi, and Tan Jiak Choo ; the inspection being satisfactory all four met at the respondent, Tan Jiak Choo's house and it was agreed

that they should become partners in the said plantation. The terms of the partnership agreed upon were alleged to be as follows :

> " The respondent Tan Jiak Choo was to have 2½ shares out of 6, Poh Swi 1 and Soo Ghi 1 and the appellant 1. One half share for reserve."

Soo Ghi was asked to take up management of the estate and he agreed ; no word was said as to his salary. Soo Ghi was also asked to negotiate with the owners of the neighbouring holdings. In accordance with this agreement, which admittedly was never reduced into writing, the said property of Wee Cheng Tiow was bought in August, 1909, out of moneys advanced by the said respondent. Subsequently in October, 1909, and up to 1911 the appellant, Tan Soo Ghi and Chua Poh Swi were engaged in attending auctions of Government lands and bought in the name of the respondent who was registered as the owner thereof upwards of 515 acres, the deposit moneys for which were paid by cheque by the appellant and Tan Soo Ghi, and shortly afterwards refunded by the respondent, who paid the purchase money of the said lands. These lands, together with certain other lots which were bought by the respondent personally, and comprising in all some 700 acres, made up what was known as the Ujong Padang Estate.

It was further proved on behalf of the plaintiffs that in August, 1909, the appellant started keeping the accounts of the estate, opening for that purpose a cash book and ledger which were produced at the trial and continued to do so until November in the same year. In the same month Tan Soo Ghi took over the management of the estates and continued to manage it until July, 1911, when the deceased Chua Poh Swi became manager until his death on November 21st, 1911, after which date one Seck Lim was appointed manager by the respondent. When the appellant ceased to keep the partnership accounts this duty was taken over by Tan Soo Yan, the respondent's son. None of these persons, Tan Soo Hock (appellant), Tan Soo Ghi, or Poh Swi, received any commission or remuneration for their services.

It was admitted that no agreement was ever drawn up, but it was alleged by the appellant that in November, 1909, Tan Soo Yan, the respondent's son, showed him a book which contained the names of the partners and their shares, and the said Tan Soo Ghi stated that, when in July, 1910, he asked the respondent for a document acknowledging his share in the partnership, the respondent showed him a book in which was written a statement of the partners and their shares. One Lim Kong Koon, a witness of the plaintiff, also alleged that the respondent told him that the plaintiff and Poh Swi were his partners. The only meetings alleged ever to have taken place between the partners was at its inception as already described, and when on the 15th September, 1911, an option was given in the name of the respondent to the Malacca Rubber Company to purchase the estate for $520,000. After the year 1911 neither of the plaintiffs took any further part in the management or business of the estate except that the appellant claimed to have helped in some disturbance amongst the

coolies in 1913 or 1914, and he alleged also that he asked the respondent for accounts in 1911 and 1914 or 1915, and was put off with the excuse that the estate was still indebted to the respondent.

The evidence given at the trial by the respondent is shortly summarised in paragraph 19 of the respondent's case as follows :—

> " The respondent's case at the trial as borne out by his evidence was that, although the appellant brought to his notice the said rubber property of 39 acres belonging to Wee Cheng Tiow and he (the appellant) and Tan Soo Ghi and Chua Poh Swi assisted him (the respondent) along with Koh Seck Lim in negotiating for and buying the land comprised in the Ujong Padang Estate, he never entered into any partnership agreement with the plaintiffs and Chua Poh Swi with respect to the said estate or any part of it, that the said estate was his own absolute property, bought and paid for with his own money, and that although Tan Soo Ghi managed the estate for him for a time from August, 1909, to July, 1911, he rewarded him for his services by giving him a present of $500 on October 31st, 1909, and by crediting him in 1912 with the sum of $50 per month for salary at a time when the said Tan Soo Ghi was still indbeted to him for money admittedly lent in July, 1911."

The only other witness produced by the respondent was his son Tan Soo Yan, and it is upon his evidence that the difficulties arising in this case mainly spring. At the trial two books, S.Y.1 and S.Y.2, were produced. Tan Soo Yan stated that S.Y.1 was the book he started in 1911 in taking over from Soo Ghi and that he copied into it Soo Ghi's accounts. As the judgment of Shaw C.J. stated :—

> " He clearly gave the Court to understand that the books produced by him were the original books of the business that had been kept regularly by him from that time to the present day. Tan Jiak Choo himself, although he does not understand English, stated that he had seen them for years, and that they were not specially written up for the purposes of the case. The books contain no reference to a partnership and no entries from which a partnership can be inferred."

It turned out, however, on the evidence of Tan Soo Yan that the books were not original books at all, and that he posted them from another book. He spoke of rough accounts kept by him and a rough cash book, but none of these books or accounts were produced. On examination of the books produced it became manifest that the books were not genuine, some of the entries in them bearing date 1920, though relating to transactions occurring in the year 1916.

The Trial Judge who saw the witnesses found that the books were false and fabricated documents not kept in the regular course of accounts between 1911 and 1919, but written up in 1920 for the purposes of this case. Neither upon the appeal from the Trial Judge, not before this Board, was any effort made to contest the finding upon this point of the Trial Judge, but the case made by the respondent was, and it was the basis of the judgment of the majority in the Court of Appeal, that, to use the language of Mr. Justice Barrett-Lennard in the Court of Appeal,

> " The vision of Sproule J. was obscured by the anger felt by him at the perjury and apparent falsification of books, of which he found the defendant

and Tan Soo Yan to have been guilty. Sproule J. thought that if the really genuine books had been produced they would have evidenced the truth of the oral testimony given by, and on the part of, the plaintiffs. He, therefore, accepted such oral testimony and ignored its high improbability and also the elementary rule of law contained in section 33 of the Partnership Act of 1890."

It is, of course, settled law that the mere fact that certain evidence of a respondent has been proved false and fabricated does not entitle a tribunal to decide in the plaintiff's favour unless he has made out his case to the satisfaction of such tribunal, see *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy Bahadoor*, 10 Moore's Indian Appeals, 123, where at p. 149 the rule in such a case is laid down as follows :—

> " When false witnesses or forged documents are produced in support of a case the fact naturally creates suspicion as to the case itself ; and if the evidence on which their Lordships act depended in any degree for its credibility or weight on such witnesses or document, they would have paused as to their conclusion."

The Judge, however, was entitled to disbelieve entirely the evidence of the defence, and in such a case as the present " to presume that Jiak Choo, capable of fabricating the books and suppressing the books upon which the new false books were based, is capable also of suppressing a journal embodying the partnership agreement he desires." Moreover such a fabrication would entitle the judge to disregard any argument founded on the fact that no entry in any book supported the existence of any partnership between the parties. The respondent was therefore driven to rely upon the improbabilities of the plaintiffs' case, and indeed he goes so far as to allege that there was no evidence to support the finding of the learned Trial Judge as to the contract of partnership which has been alleged.

Their Lordships are not unmindful of the strength of the case made by the respondents on this point, and indeed Mr. Justice Sproule succinctly criticises the weakness of the plaintiffs' case in quoting the argument put forward by the defendant's counsel :

> " Plaintiffs can produce very little evidence of the assertion by them or the admission of Jiak Choo between 1909 and 1920 of the partnership now disputed. Poh Swi who died in 1911, made no mention of the Ujong Padang Estate in his will. Shortly before his death, he gave Jiak Choo a written acknowledgement of Jiak Choo's partnership in other, smaller properties standing in Poh Swi's name. The estate was not included by Jiak Choo and Poh Swi's brother Poh Eng in their executors' affidavit for the collector in the goods of Poh Swi, deceased. Few partnership meetings are alleged by plaintiffs, and no close acquaintance with the growth and development of the estate or details of its finances, or management subsequent to 1911. In 1914 both brothers found themselves in temporary financial difficulties but made no attempt to resort to their interest in Ujong Padang Estate."

The respondent has with great elaboration set forth the facts on which he relies as showing that the appellant never discharged the burden of proving the alleged partnership in par. 20 of his

case, and all the facts are very carefully marshalled and dealt with in the judgment of Whitley J., Acting Senior Puisne Judge, in the Court of Appeal, and were forcibly placed before this Board by the learned Counsel for the respondent. It is unnecessary in the view taken by their Lordships to deal with them in detail, and they may be shortly stated as coming under the following heads :—

1. The improbability of the respondent having entered into a partnership agreement by which the respondent should give a controlling interest and a share of the estate to the other partners larger than that of the respondent who put up all the capital and took all the risk.
2. The absence of any entry in any books produced of any such partnership or any letter or document whatever supporting the contention of the plaintiffs.
3. The absence of all mention in the will of Chua Poh Swi, or in the affidavit sworn by the executors of the will.
4. The borrowing of money by the appellant from the respondent in 1911, and the failure to make any claim when he was in financial difficulties.
5. The fact that the appellant never made a claim in writing until the respondent had at the end of January, 1920, demanded payment of seven years arrears of rent due in respect of premises in Malacca which he had let to the appellant.

Their Lordships, however, are of opinion that all these were questions with which the Trial Judge, who had the advantage of seeing the witnesses, was especially capable of considering, having regard to his long experience in dealing with Oriental people during nearly the whole of his life, and their Lordships cannot but think that such an experience in deciding these disputed questions must be given the greatest possible weight in coming to a conclusion upon such questions. As regards No. 1, he states (and he is in a better position to judge than this Board is) that even if you do not take into consideration the family ties between the parties he does not think any one who remembers the spirit of those times will venture to say that such an agreement was in any degree improbable, and as regards the other questions he says that in coming to a conclusion there are three considerations which have influenced him ; one is that they could not cross or corner the head of the family ; another is that they trusted him ; another is that they did not expect that the estate would be clear of the debt to the respondent until 1917 or 1918 ; and the learned Judge was certainly entitled, as he stated he did, to discredit the whole of the evidence given by the respondent and his son. Their Lordships, therefore, find themselves in agreement with concluding observations in the judgment of Shaw C.J. in the Court of Appeal :—

> " To briefly summarise the case there is the verbal evidence of four witnesses, which the Judge has accepted, of the existence of a partnership,

but considerable doubt is thrown on that evidence by certain improbabilities that I have mentioned. On the other hand, there is the undoubted fact that the defendant has wilfully withheld from the Court the most important documents connected with the case and has endeavoured to mislead the Court into believing that certain books made up from some source, just before or during the pendency of the case, were the original books of the business kept from the year 1911. I find myself under the circumstances quite unable to say that the decision of the Judge was erroneous."

Their Lordships have thought it unnecessary to deal with the question raised as to the meaning of the Chinese character "Kee"—which was found to follow the name of the respondent in the Chinese accounts which were examined and translated by the Court of Appeal, and were alleged to signify that he was a partner. Their Lordships are of opinion that as this character is ambiguous and is alleged to have several meanings it would be unsafe to give any weight to such evidence in coming to a conclusion upon the facts.

Their Lordships are of opinion that the appeal should be allowed with costs, and the judgment of Mr. Justice Sproule should be restored, subject to such amendment as may be entailed by the following considerations. Under the order made by the Trial Judge it was declared that the appellant and Tan Soo Ghi were partners with the respondent, and under the existing circumstances the appellant and his brother were each entitled to one in $4\frac{1}{2}$ shares, subject to the claim of the representatives of the said Chua Poh Swi, since deceased. This declaration was founded apparently upon an allegation made in the statement of claim that after the death of the said Chua Poh Swi the appellant and his brother each became entitled to one share in $4\frac{1}{2}$ shares in the partnership, assets and profits subject to the claim of the representatives of the said Chua Poh Swi. No evidence was given of any new arrangement having been come to upon the death of Chua Poh Swi—in fact, the partnership seems to have continued as before without any account having been taken of the share of the said Chua Poh Swi which remained in the business, and it will therefore be necessary to amend the order by finding the terms of the partnership as stated in paragraph 3 of the statement of claim, and leaving it to the Court to work out the interest of all the parties having regard to the fact that the partnership was carried on after the death of Chua Poh Swi as before, and that the assets of the said partner remained in the partnership.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

TAN SOO HOCK

v.

TAN JIAK CHOO AND OTHERS.

DELIVERED BY LORD CARSON.

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