Privy Council Appeal No. 4 of 1929.

M. M. Ispahani - - - - - - - - *Appellant*

v.

Societa Veneziana di Navigazione a Vapore - - - *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 4TH MARCH, 1930.

Present at the Hearing.

LORD BLANESBURGH.
LORD WARRINGTON OF CLYFFE.
SIR CHARLES SARGANT.

[*Delivered by* LORD BLANESBURGH.]

This was an action for damages for breach of a contract made on 2nd February, 1925, to ship 2,000 tons of rice from Rangoon to Mediterranean and Black Sea Ports by any of the respondents' steamers in March or April, 1925, at steamer's option. The action was brought by the respondents, the shipowners, against the appellant, the shipper in the High Court of Calcutta in its original jurisdiction. The contract was admitted, and performance of it was not set up.

The appellant's answer to the claim against him was that the contract had before breach been duly rescinded by mutual consent. Separately, if the contract did remain in force, the amount claimed was excessive. The respondents had not minimised their damage, as it was their duty to do. These two issues, raised by the appellant, were substantially the issues at the trial.

All the evidence on both sides had before the hearing been taken on commission and for the most part at Rangoon. This was probably inevitable. The action depended at Calcutta. But it was at Rangoon that the transactions in question had all been carried out between the representatives there of the respon-

dents and the appellant, and these representatives on both sides were still resident at that place.

The result of the procedure adopted has, however, been an embarrassment to every tribunal subsequently called upon to deal with the case. Upon the vital issue of rescission there is an acute conflict of testimony between witnesses not shown to be unworthy of credit. It might accordingly have been of the greatest help to the Trial Judge in determining where the real truth lay to see all these witnesses in the box. With their evidence taken on commission, he remained as dependent as was the High Court upon the printed record alone. All Courts again have suffered from the fact that taken on commission none of the evidence was adduced under the personal direction of the learned Judge who had to decide the dispute. It does not seem to be doubtful that in the present case if Mr. Justice Buckland's presiding influence had been available while the evidence was being taken questions which have ceased to be, if they ever were, important would not have become preponderant, while the testimony upon the vital issue in acute controversy would have been made more complete than in many important aspects and on both sides it is left.

Upon this incomplete printed material to which both Courts were so relegated, divergent conclusions have been reached. Mr. Justice Buckland was, upon the evidence, of opinion that the appellant had made good his plea of rescission, and by a decree of the 28th June, 1927, he dismissed the respondents' action with costs. On appeal by them to the Appeal Court, the learned Judges there came to the conclusion that the appellant had failed to establish his case of rescission and on the 24th January, 1928, that Court allowed the respondents' appeal, decreed the suit, and directed an inquiry to ascertain the damages sustained by the respondents through the appellant's breach of contract.

Hence the present appeal. The defendant appellant seeks to have the decree of dismissal restored. He is content, however, if the judgment of the Appeal Court is in other respects to stand, that the inquiry as to damages shall go as directed by its decree. The Board accordingly is concerned only to determine whether the appellant has or has not established in evidence his plea of rescission.

In this task their Lordships have been greatly assisted by the elaborate and most carefully-expressed opinions of Mr. Justice Buckland at the trial, and of the learned Chief Justice, who, on appeal, delivered the judgment of the Appeal Court. A perusal of the two judgments discloses quite clearly the stages at which they diverge, and their Lordships thereby dispensed from again going over all the ground which with such care has been judicially explored in both Courts, are in the result enabled, more compendiously to expose their reasons for the conclusion which, in the result, they have themselves reached.

The appellant is a merchant of Calcutta, with a branch business at Rangoon. He is represented there by Mr. Sadeq

Ispahani, who was alone concerned on the appellant's side in the transactions now in question. It will be convenient to refer to him as Mr. Sadeq.

The respondents, plaintiffs in the action, are a company owning a line of steamships trading with the East. Their headquarters are at Venice. They are represented at Rangoon by Messrs. Gillanders, Arbuthnot & Co., a well-known firm of Indian merchants, with a branch there, of which Mr. Arthur Ellison Forster was manager at the time.

Amongst Gillanders' agencies at Rangoon two only enter into the story—their agency for the respondents, and their agency for the Lloyd Triestino Steam Navigation Company, as owners of the S.S. *Numidia*.

The appellant is an extensive shipper from Rangoon, and Mr. Sadeq was, it appears, in frequent association with Gillanders as representing shipping companies whose vessels trade with that port. In October, 1924, he had engaged with them, acting on behalf of the Triestino Company, for the carriage, by a January/February, 1925, shipment, of 1,000 tons of rice from Rangoon to Mediterranean ports. That time limit fixed for shipment was important to the appellant. He was under contract with buyers of the rice at the ports of destination upon terms which could not be fulfilled by any later shipment. The *Numidia* of the Triestino Line, timed to arrive at Rangoon in February, was in due course appropriated to the contract, and it was in these circumstances that, on the 28th January, 1925, Mr. Sadeq was informed by Mr. Vertannes, a representative of Gillanders, that according to advices just received the *Numidia* was delayed in her voyage and could not reach Rangoon in February. It is now common ground—and the fact becomes of real importance in the sequel—that this information was first given to Mr. Sadeq on the day named, and not later. His earlier recollection, as reflected in the appellant's original written statement, apparently was that the information reached him after the contract now being sued on had been made, and not before. This, however, was not so. It results from his admission—it may be more correctly described as his assertion in evidence—that he had been so informed five days before he made the contract at all. It is in the light of that fact, amongst others, that the question in suit has to be determined: whether four days later the contract entered into by Mr. Sadeq in that knowledge was in turn rescinded at his instance in the circumstances he states.

Mr. Sadeq's account and explanation of the rescission may be summarized as follows. On the 2nd February when he engaged space for the 2,000 tons of rice by the respondents' firm, he had no actual buyers of the cargo in prospect. As prospective buyers he was looking to those who had already taken up the cargo to be shipped on the *Numidia*. By the 6th February,

however, he realised that owing to the late arrival of that vessel he would be in such difficulties with these buyers that he could not hope, so soon afterwards, to make any further sales to them, and it might be difficult to obtain other buyers. He became therefore desirous of being relieved of the contract of the 2nd February. He had something to offer in return, because Gillanders, in his view, were liable to the appellant in substantial damages in respect of the *Numidia's* late arrival. Mr. Sadeq's proposal on the 6th February, made by him, as he says, to Mr. Forster, accordingly was that in consideration of the appellant renouncing all claims for damages in respect of the late arrival of the *Numidia*, Gillanders on behalf of the respondents would cancel the appellant's contract of the 2nd February. And Mr. Forster, so Mr. Sadeq says, agreed on the respondents' behalf, to this proposal. No one else was present, and Mr. Forster denies that he made or could have made any such agreement.

Now, it must, their Lordships think, be conceded, that if that were all, Mr. Sadeq's story, disputed as it is, does not carry conviction. He does not explain with any effect why it was that the late arrival of the *Numidia*, which did not stop him from engaging this tonnage on the 2nd February, should only four days later have impelled him, if he could, to relinquish it. And there is evidence as to the market scarcity of freight at both dates sufficient to lead him both to obtain and to retain the tonnage as an ordinary business transaction. And Mr. Sadeq produces no protest from any of his buyers of date earlier than the 9th February. He does, it is true, suggest almost casually, that his information as to the late arrival of the *Numidia* was more definite by the 6th than it had been on the 2nd February. But that is a very different thing from having had no information at all on the 2nd, and, moreover, no support in any direction is forthcoming for the suggestion that Mr. Vertannes's intimation of the 28th January was not completely specific or that it needed or obtained any later confirmation. But these are only preliminary difficulties in Mr. Sadeq's way. There are others. He does not suggest that as between the appellant and the respondents he had any ground upon which he could ask for a gratuitous cancellation of his contract. He recognised, if his request was to be acceded to, that some consideration to somebody for the cancellation must proceed from the appellant, and while their Lordships are ready to go far in crediting Mr. Sadeq with the belief —however mistaken—that a release of Gillanders from a personal liability would justify them in procuring for him a gratuitous release from the respondents whom they also represented, the proposal, if ever made, must have impressed Mr. Forster very differently. For one thing, it was beyond reason that the late arrival of the *Numidia* could have involved Gillanders in any personal liability at all to shippers by her. But, more important far, the suggestion of Mr. Sadeq, if made in the terms and for the inducement deposed to, must at once have struck

Mr. Forster as a proposal not to be listened to; one which it would be dishonourable for Gillanders to accept or even to entertain.

Further, if the proposal was made, it is hardly possible that Mr. Forster, so far as appears, an honourable business man, could have forgotten it. Yet he has no recollection of it at all. His recollection of the interview deposed to after a two years' interval was vague. It related, as he recalled it, only to Mr. Sadeq's difficulties in regard to the appellant's *Numidia* shipment, and had nothing to do with his contract with the respondents. And confirmation of this is not wanting in what subsequently happened. According to Mr. Sadeq's statement, as their Lordships understand it, the appellant in consideration of the release was to stand by his contract with the Triestino Company, making, however, no claim in respect of the *Numidia's* late arrival. He was himself to settle with his buyers. What subsequently happened, however, shows that Mr. Sadeq treated that contract as entirely at an end, for ultimately Gillanders secured for the appellant, by the respondents' steamship *San Michele*, which sailed from Rangoon for Mediterranean ports in February, room for 850 tons of the appellant's rice, destined for the *Numidia*.

Mr. Sadeq was quite unable to give any sensible reason why Gillanders, agents of the Triestino Line, were entitled or should have troubled to render him this service through the Venice Line if, as his case was, his contract in relation to the *Numidia* stood but with all liability in respect of her late arrival, so far as concerned the appellant, at an end.

All these considerations make Mr. Sadeq's story unlikely. But his preliminary difficulties are not even yet ended. The transaction was undoubtedly important. Mr. Sadeq so regarded it. Yet no memorandum of it exists. None was made or sent by Gillanders either to their principals the respondents or to Mr. Sadeq. More remarkable still, no note of it was made or sent by Mr. Sadeq to Gillanders. The contract rescinded had been the subject of a memorandum in writing sent to Mr. Sadeq. Its rescission four days later remains unrecorded anywhere.

These difficulties in the way of the appellant's case are formidable indeed and they were, in their Lordships' judgment, unduly discounted by the learned Trial Judge. But even so, it seems clear, that if there had been nothing more to be considered he, too, would have held that the appellant had failed to establish his plea of rescission. His conclusion that he had proved it really resulted from his finding that, as it happened, although all unknown to Mr. Sadeq, cancellation of the contract of the 2nd February was, on the 6th February, as much to the relief of Gillanders as it could be to the appellant. As a result of inconsistent instructions from the respondents, Gillanders were then embarrassed as to the March-April tonnage, and he finds corroboration of his resulting view that rescission had really been agreed to in the fact which he holds proved that Gillanders within a few days were offering the surrendered

tonnage to another shipper. Above all he is unfavourably impressed by the respondents' failure to call as a witness Mr. Stewart, the one member of Gillander's staff to whom all the facts were known at first hand, and who could have resolved one way or another the uncertainty in which the whole matter is left by the incomplete evidence on both sides.

The real difference between the Appeal Court and the learned Judge is to be found at this stage. The learned Judge did not, in the view of the Appeal Court, correctly appreciate the position. Gillanders' embarrassments were less serious than he supposed. The absence of Mr. Stewart from the witness-box, however, regrettable, did not prove the appellant's case. And their Lordships find themselves in general agreement with the Appeal Court. Indeed the action of Gillanders so far as it is proved. suggests to their minds that no desire to cancel the appellant's contract with the respondents had, on the 6th February, even been expressed by Mr. Sadeq. As to the assertion that the appellant's reserved tonnage was subsequently on offer by Gillanders, while they agree with the learned Judge in their appreciation of its seriousness, they are unable in the circumstances to regard it as proved.

It seems to their Lordships to be established that in early February, 1925, there was a demand generally for March-April tonnage from Rangoon in excess of the expected supply. On 6th February Gillanders had before them a cable from the respondents of the 2nd February in which they expressed a desire to cancel to the extent of 4,000 tons the space for these shipments which Gillanders had been authorised to let. Before receipt of that cable all the authorised space was under offer or had been let. The appellant had taken 2,000 tons of it. In these circumstances it seems to their Lordships that on the 6th February, if the request were then made by Mr. Sadeq as he says, Mr. Forster while presumably not in a position to accede to it without further instructions, must at least have informed his principals that 2,000 tons could be freed if they desired that smaller quantity. Gillanders, however, did nothing of the kind. What, in fact, happened was that on the 7th February Mr. Vertannes cabled for authority to let further tonnage.

All this, as it seems to their Lordships, so far from negativing, tends to support the view that Mr. Sadeq's request, if it were ever made, was not appreciated by Mr. Forster and was certainly not granted.

The second circumstance on which the learned Judge relies is more cogent.

There was taken on commission a mass of evidence directed to show that the respondents had not minimised their loss. The point stressed in cross-examination of their witnesses was that they had not accepted from Messrs. Steel Brothers, another Rangoon firm of shippers, an offer to take the vacant tonnage, after they knew in March, 1925, that the appellant was relying

on the fact that his contract had been duly rescinded. As his very last witness, the appellant, with a view to proving his case on this point, called a Mr. Matthew, assistant manager of Steel Brothers, knowing nothing, as their Lordships were informed, of what the witness would say. Quite unexpectedly Mr. Matthew deposed that Gillanders in February, 1925, themselves offered Steel Brothers 2,000 tons March/April shipment by the Venice Line at rates which were in fact identical with those to be paid by the appellant and that Steel Brothers, by a counter offer made as early as the 16th February, 1925, offered 2s. 6d. per ton less, and that Gillanders did not accept it. With reference to this evidence, Mr. Justice Buckland's finding is very express :—

"I regard it as established beyond all question," he says, "that an offer of space was made to Steel Brothers in the terms to which this witness speaks." And the importance of the finding he summarises later as follows :—

> "No explanation whatever consistent with the plaintiff company's case is suggested of the offer to Steel Brothers which will exclude it having reference to the 2,000 tons of space booked by the defendant firm."

In other words, this evidence showed that the 2,000 tons could only be free as the result of the rescission deposed to by Mr. Sadeq.

Their Lordships appreciate the force of the learned Judge's reasoning. At its face value Mr. Matthew's evidence is most important, and its importance is heightened by the conflicting evidence from Gillanders as to the relevant bookings, and by the absence from the witness box of Mr. Stewart, who was the one person to make all these things plain. But their Lordships have to ask themselves whether this statement of Mr. Matthew's is by itself sufficient to displace on the direct issue not only the sworn evidence of Mr. Forster, but all the other matters to which they have referred, and which together make the appellant's case so difficult of acceptance. In their judgment it is quite insufficient for that purpose, and they cannot but feel that the learned Judge himself would have hesitated to act upon it with the confidence he did if he had been more impressed than he was by those serious preliminary difficulties in the appellant's way, which their Lordships have detailed. And Mr. Matthew's evidence, circumstantial as superficially it appears to be, is by no means completely convincing. It was not directed at all to the issue of rescission, and it is quite clear from their questions to the witness that counsel on neither side realised at the time that it might have a material bearing upon that issue. Accordingly, there was neither examination nor cross-examination as to his means of knowledge nor as to the circumstances of the alleged offer, nor anything in relation to it. Nor can it be assumed, as their Lordships think, that the offer if made as stated necessarily related to the respondents'

tonnage. Further, as to the failure of the respondents to call Mr. Stewart, the failure was, their Lordships, think, most regrettable. But it has to be noted that not only was the possible bearing of Mr. Matthew's evidence not appreciated when it was given, but he was the appellant's last witness, the respondents' evidence having been concluded some time before. At that stage it seems to have been common ground—or at least the view of the appellant's advisers—that Mr. Stewart's evidence would have been valuable only on the quantum of damages to which question so much of the evidence taken was being directed.

Their Lordships think it unnecessary to canvass the matter further. On the whole case, and even without having heard the learned counsel for the respondents, they are led to the conclusion that the judgment of the Appeal Court expressed on the evidence the only conclusion judicially permissible. They think, with the learned Chief Justice, that the appellant has not shown "beyond a reasonable doubt that the contract of the 2nd February was verbally cancelled on the 6th."

Their Lordships accordingly will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council.

M. M. ISPAHANI

v.

SOCIETA VENEZIANA DI NAVIGAZIONE A VAPORE.

DELIVERED BY LORD BLANESBURGH.

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