No. 19 of 1951.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CEYLON.

BETWEEN—

MOHAMED AKBAR ABDUL SATHAR
(Plaintiff) *Appellant*

— AND —

1. W. L. BOGTSTRA and
2. H. DE WILDT,

both carrying on business in partnership under the name, style and firm of "Bogtstra and De Wildt" (Defendants) *Respondents.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal from a decree of the Supreme Court of Ceylon dated the 25th April, 1949, which set aside (save as to a sum of Rs. 500 admitted to be due to the Appellant) a decree of the District Court of Colombo dated the 25th June, 1947, in favour of the Appellant, the plaintiff in the action. pp. 71-2. pp. 55-6.

2. The Appellant sued on a contract of employment with the Respondents and claimed an account of profits, arrears of salary and commission, and salary in lieu of proper notice or damages for wrongful dismissal. pp. 5-7.

3. The Respondents (Defendants) by their Answer admitted that the Appellant was entitled to Rs. 500 being salary for December, 1944, but denied that he was entitled to or had ever been paid any share of profits. Various payments which had been made to him were, they alleged, bonus payments, and were mere bounty. They further alleged an agreement that the Appellant should resign from the 31st December, 1944. pp. 8-9.

4. The principal question in the case was one of fact, as to whether the agreement alleged by the Appellant was made. The learned trial judge, who saw the witnesses, found that it was made, and the Appellant submits not only that this finding was correct but also that there was no legal basis, nor any material in the Record, on which an appellate court could properly reverse the finding.

p. 10. 5. At the trial nine issues were framed, which raised the questions whether it had been agreed that from the 1st April, 1940, the Appellant should receive one-eighth of the nett profits of the Respondents' General Import Department; whether the Appellant was entitled to such share up to the 31st March, 1945; whether the Appellant had received such share for three years or had merely received *ex gratia* payments; whether the alleged agreement to resign had been made; and whether the Appellant was entitled to damages.

pp. 10-23. p. 11, ll. 11-20. 6. The Appellant in his evidence stated the agreement thus:—

"When business started coming in I said that I should be "given a commission, not on the gross sales but on the net "commission earned by the department—I mean on the net "profits of the department. I suggested this to Mr. Bogtstra" (the first Respondent) "and he agreed. . . . The agreement "between myself and the defendants was that I would be paid "a 1/8 share of the profits of the sundries department besides "my salary of Rs. 150/–. I was to be paid this as from 1.4.40."

p. 11, l. 41- p. 12, l. 10. The Appellant further stated that on the 4th January, 1941, he asked for an advance on his commission account and Rs. 2,500 was paid to him by cheque written by the accountant and signed by the

p. 77. first Respondent, whilst the words "Advance against Commission" on the Counterfoil (Exhibit P.4) were in the handwriting of the second Respondent. The Appellant gave a receipt for the sum as

p. 77. an advance against his commission account. The Respondents'

p. 12, ll. 17-23; p. 79, l. 4; p. 85, l. 9, l. 30; p. 101, l. 17. books contained entries referring to the Appellant's commission. The Appellant stated that when he asked for an advance of commission the first Respondent made a calculation of gross profit on a piece

p. 12, l. 28- p. 13, l. 2. p. 79, l. 20. of paper (Exhibit P.6), deducted charges including tax, and estimated the nett profit at Rs. 40,000, making the Appellant's share

p. 79, l. 30. Rs. 5,000, to which the Appellant agreed. The Appellant later received a cheque for Rs. 2,399.53 as the balance then due. The

p. 13, ll. 17-37. Appellant also gave evidence that for the years ended March, 1942 and 1943 nett profits were estimated at Rs. 72,000, of which the

p. 85, l. 16, l. 19, l. 26. Appellant's share was Rs. 9,000. The Respondents' ledger showed an entry for the 31st March of each of the years 1941, 1942 and 1943 under the head of "bonus". The amounts were Rs. 5,000, Rs. 5,000,

and Rs. 4,000. For the 30th October, 1943, the account (Exhibit P.5) was debited with Rs. 8,500 "in settlement of commission". A day book kept by the Appellant showed entries of commission based on profits. p. 85, l. 30. p. 80.

7. The Appellant further gave evidence that thereafter he was paid no commission for the period from the 1st April, 1943 to December, 1944, although business was good. His salary had been raised to Rs. 500 a month, to include "dearness allowance" but not commission. He had asked for an account but had been put off with excuses, and at the end of November, 1944, he was dismissed. He claimed three months' salary as damages, and his share of profits from transactions completed by delivery before he left the Respondents' service. p. 13, l. 36-p. 15, l. 4.

The Appellant's evidence was not in any way shaken in prolonged cross-examination. p. 15, l. 36-p. 22, l. 15.

8. One Victoria, who had been the Respondents' bookkeeper at the material times, corroborated the Appellant's evidence on matters relating to the accounts. He stated that the counterfoil of the cheque for Rs. 2,500 "Advance against Commission" (Exhibit P.4 mentioned above) was in the handwriting of the second Respondent, and that the first Respondent had on one occasion asked him to give the Appellant a statement of profits of the sundries department. The witness had also furnished the first Respondent at his request with profit figures from the balance sheets. pp. 24-26. p. 24, l. 16. p. 25, ll. 30-41. p. 84.

The witness was not cross-examined. p. 26, l. 15.

9. The first Respondent was the only witness for the defence. The Appellant submits that his evidence was very unsatisfactory. Amongst many inconsistencies and improbabilities attention may be called to the following: pp. 26-46.

(a) While admitting that the Appellant had shown quite exceptional industry and had been absolutely trustworthy, the first Respondent asserted that there was no agreement for a share of profits and that the sums of Rs. 5,000, Rs. 5,000 and Rs. 4,000 had been gifts similar to the bonuses paid to the other employees. The books, however, showed that no comparable bonus was paid to any other employee. p. 28, l. 4; p. 39, l. 21; p. 41, ll. 6-10. p. 28, ll. 1-23. p. 44, ll. 1-20.

(b) The first Respondent said that if there had been an agreement it would have been in writing, but he agreed that he had been in partnership with the Appellant in another business without any written agreement, and that in the Respondents' business he had previously employed another man, agreeing to pay him commission, without having a written agreement. p. 28, l. 13. p. 43, ll. 43-45; p. 33, ll. 3-8.

p. 28, l. 38-
p. 29, l. 4;
p. 79;
p. 42, ll. 7-32.

(c) The first Respondent admitted that he wrote the slip of paper (Exhibit P.6, mentioned above) with particulars of profits for 1940–41, but denied that he gave it to the Appellant. He could give no reason for writing it, and said that it must have been in the file for the information of the accountant, thus suggesting that the Appellant or someone in league with him had abstracted it. No such suggestion had been put to the Appellant in cross-examination nor had his statement that the first Respondent had given him the paper been challenged.

p. 31, ll. 2-7.

(d) Faced with a claim for three months' salary in lieu of notice, the first Respondent gave evidence that the Appellant resigned as from the end of the year and the first Respondent had accepted his resignation in August or September, 1944. This had not been put to the Appellant and was inconsistent with the pleadings and correspondence.

p. 9, ll. 13-16;
pp. 102-105.

p. 33, l. 40;
p. 79;
p. 34, l. 34.
p. 37, ll. 21-24;
p. 85.

(e) The first Respondent said the entry "Advance against Commission" (Exhibit P.4) was a mistake for which he had scolded the bookkeeper. He had had (he alleged) another row with the bookkeeper over the entry of the payment "in settlement of commission" (Exhibit P.5). Neither of these incidents was put to the bookkeeper when he gave evidence for the Appellant and said his entries were on instructions of one or other of the Respondents. The first Respondent asserted that he, his partner, and the bookkeeper had all made mistakes in referring to commission in the documents.

p. 25, ll. 3-12.

p. 34, l. 33-
p. 35, l. 9;
p. 37, l. 18-
p. 38, l. 31.

10. In his judgment the learned trial judge said:—

p. 53, ll. 42-5.

"Plaintiff gave his evidence quite well. He did not contra-"dict himself on any material point. As for the 1st defendant" (the first Respondent, the only witness for the Respondents) "he was most unreliable in the witness box. He contradicted "himself more than once and said things that could not possibly "be true . . .

p. 54, ll. 7-8.

"As between the plaintiff and the 1st defendant I have "no hesitation in accepting the word of the former."

p. 54, ll. 12-20.

The learned trial judge held, however, that since the Appellant, on being dismissed, said that he was glad and relieved to sever his connection with the Respondents' firm, he could not claim salary or damages beyond the Rs. 500 admittedly due to him for December, 1944. The learned judge therefore gave judgment:

p. 54, l. 36-
p. 55, l. 10

for this Rs. 500;

for an account of profits for the year to the 31st March, 1944, or in default of accounting for Rs. 28,125;

for an account of profits from the 1st April, 1944 to the 31st December, 1944, or in default for Rs. 4,375;

for an account of profits on transactions and contracts arranged by the Appellant and performed after the 31st December, 1944, or in default for Rs. 3,125;

and for costs.

11. The Supreme Court reversed the District Court and dismissed the Appellant's action except for the admitted sum of Rs. 500. The judgment was delivered by Nagalingam J. with whom Gunasekara J. agreed. The judgment began with an explanation of why the Court thought that it was in a position properly to interfere with the trial judge upon a pure question of fact. This explanation, it is submitted, entirely ignores the fact that the Appellant, whom the Respondents had found to be entirely trustworthy, had given evidence of his agreement with the first Respondent, and that judgment could not be given for the Respondents without finding that the Appellant had put forward a deliberately false story. There had been a direct conflict of evidence; the Appellant had not been shaken in cross-examination; the first Respondent, on the other hand, had been severely shaken, and the second Respondent, who admittedly had first-hand knowledge of some of the most important facts, did not give evidence. The Appellant submits that the circumstances did not warrant any interference with the learned trial judge's findings of fact.

pp. 71-72.

pp. 59-71.
p. 59, ll. 22-38.

12. Mr. Justice Nagalingam examined the evidence and the documents, and took the view that there were improbabilities in the Appellant's story, and reasonable explanations of the points made against the Respondents. He concluded by accepting the evidence of the first Respondent and by holding that the Appellant's action was a "speculative one . . . built on the quicksands of half truths "and mutilated facts", which must of necessity fail.

pp. 60-71.

p. 71, ll. 7-10.

13. The Appellant respectfully submits that the reasoning of the Supreme Court is open to criticism except on a few minor points; that the findings of the learned trial judge were much more in accord with a true view of the evidence and of the documents; and that there was no basis on which those findings could properly be reversed.

14. The Appellant therefore submits that this appeal should be allowed and the judgment of the learned District Judge restored, and that the Appellant should have the costs of this appeal and in the Supreme Court, for the following amongst other

REASONS.

1. BECAUSE the evidence established the Appellant's claim.
2. BECAUSE the learned trial judge, having seen the witnesses, rightly found the first Respondent to be unreliable and the Appellant to be a witness of truth.
3. BECAUSE there was no material in the record which justified an appellate court in reversing the learned trial judge's findings.
4. BECAUSE the Supreme Court in effect found the Appellant's claim to be a calculated fraud, and such a finding is based on grounds which are demonstrably unsound.

D. N. PRITT.

FRANK GAHAN.

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— AND —

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