Privy Council Appeal No. 4 of 1969

Bajaj Textiles Limited – – – – – – *Appellants*

v.

Gian Singh & Company Limited – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA HOLDEN AT SINGAPORE (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JUNE 1971

Present at the Hearing:

LORD DONOVAN
VISCOUNT DILHORNE
LORD PEARSON

[*Delivered by* LORD PEARSON]

In 1951 and 1952 the appellants, Bajaj Textiles Limited, had taken over the rights and liabilities of the firm Bajaj Textiles, and the respondents, Gian Singh and Company Limited, had taken over the rights and liabilities of the firm Gian Singh and Company. The appellants were the plaintiffs in the action, which they commenced against the defendants (now the respondents) nearly eight years ago on 19th July 1963, claiming the sum of $1,336-35 as the balance of price of goods sold and delivered after giving credit for certain items. For convenience the appellants will be referred to as "the plaintiffs" and the respondents as "the defendants". The defendants alleged a set-off and counter-claim which as amended was for the sum of $690,377-66 as the balance in their favour on a running account, of which extensive particulars were given. The action did not come to trial until 2nd May 1967. According to a statement of defendants' Counsel recorded in the learned judge's notes (and so far as appears from those notes not disputed) the long delay was due to the plaintiffs after a change of solicitors making a very late application for particulars which necessitated a postponement of the trial when it was imminent. The hearing was on 2nd, 3rd, 4th, 5th and 8th May 1967 and on 22nd May 1967 the learned judge in his reserved judgment decided in favour of the defendants and made an order "that the Registrar of the High Court do take an account of all transactions on the running account between Gian Singh & Co. and Bajaj Textiles and Gian Singh & Co. Ltd. and Bajaj Textiles Ltd. from the 14th day of May 1951 to the 31st day of December 1962 and kept in the books of Gian Singh & Co. and Gian Singh & Co. Ltd". The plaintiffs appealed to the Federal Court of Malaysia, but judgment dismissing the appeal was given on 29th February 1968 and the formal order was made on 14th March 1968. An order granting leave to appeal to the Judicial Committee of the Privy Council was made on 17th June 1968. Since then nearly three years have elapsed. The

appellants lodged a printed case and were represented in this appeal, but the respondents did not lodge any printed case and were not represented in this appeal. The appellants are asking for the judgments of the trial judge and the Federal Court to be set aside and for a new trial to be ordered.

The learned judge, Chua J., found the following facts as to the nature of the dealings between the parties:

> ". . . Hardial Singh, Inder Singh, Hira Singh and Balwant Singh are brothers. Prior to 1951 they were all partners in the firm of Gian Singh & Co., the firm of Bajaj Textiles and some other firms in Singapore, Malaya and India. Gian Singh & Co. was the firm which indented goods from all over the world and had all the necessary banking facilities. In 1951 the partnership was dissolved. Hira Singh and Balwant Singh took over and carried on the business of Gian Singh & Co. and Inder Singh took over and carried on the business of Bajaj Textiles as sole proprietor. Prior to the dissolution of the partnership large quantities of goods had been ordered from all parts of the world by Gian Singh & Co. and confirmed letters of credit through the banks had been established and firm contracts had been entered into. Under the Deed of Dissolution of the partnership these goods when they were received by Gian Singh & Co. were to be divided in these proportions—27½% to Hardial Singh, 25% to Inder Singh, 23¾% to Hira Singh and 23¾% to Balwant Singh. The brothers were to pay to Gian Singh & Co. for the goods delivered to them. After the dissolution of the partnership, Gian Singh & Co. delivered the goods to the brothers as and when they arrived. In January 1952 Gian Singh & Co. Ltd., the defendants, were established which took over all the assets and liabilities of the firm of Gian Singh & Co. and Balwant Singh became and is still the managing director. On the 17th September, 1951, Bajaj Textiles Ltd., the plaintiffs, were incorporated and Inder Singh became and still is the managing director. One of the objects of the plaintiff company was 'to acquire the business and the goodwill of the business carried on at Singapore under the name or style of Bajaj Textiles, or any part or parts thereof and the assets and property or any part of the assets and property of such business and for this purpose to enter into and carry into effect with or without modification any necessary agreement or agreements'."

At the trial there was a dispute as to whether the plaintiffs, Bajaj Textiles Limited, had taken over the liabilities as well as the rights of their predecessor firm, Bajaj Textiles. The judge, preferring the evidence given by Balwant Singh for the defendants to the evidence given by Inder Singh for the plaintiffs, found that the plaintiffs had taken over the firm's liabilities. This finding seems to be strongly corroborated by affidavit evidence adduced at the hearing in the Federal Court. The affidavit was sworn by Balwant Singh, and it exhibited (i) the balance sheet of the firm Bajaj Textiles as at 31st December 1951, showing a debt of $1,225,039-81 owing "on current account" to Gian Singh and Company (ii) the balance sheet of the plaintiffs, Bajaj Textiles Ltd., as at 31st December 1952 showing a debt of $589,901-63 owing to the defendants, Gian Singh and Company Limited, and (iii) the balance sheet of the plaintiffs, Bajaj Textiles Limited, as at 31st December 1953 showing a debt of $589,231-07 owing to the defendants Gian Singh & Company Limited. It seems a likely inference that the sum of more than $1,200,000-00 owing by the firm to the firm on current account at the end of 1951 had been reduced to under $600,000 but as so reduced was owing by the plaintiffs to the defendants at the end of 1952 and at the end of 1953. At any rate the Federal Court upheld the finding of the

trial judge that the plaintiffs had taken over the liabilities as well as the rights of their predecessor firm, Bajaj Textiles, and no argument to the contrary has been presented in this appeal.

The trial judge also held that there was a running account between the plaintiffs and the defendants. On this point there are indications in the pleadings and other documents. The reference to a current account in the balance sheet of Bajaj Textiles as at 31st December 1951 has already been mentioned. After the issue of the plaintiffs' writ on 19th July 1963 the defendants in an affidavit of 7th August 1963 and in a defence and counterclaim said that they had a running account with the plaintiffs and claimed a set-off and counterclaim for $27,570-83. On 20th August 1963 Inder Singh in an affidavit on behalf of the plaintiffs denied that the defendants had a set-off and counterclaim amounting to more than the plaintiffs' claim, and he said " The running account referred to by the defendants is a distinct and separate issue altogether and has no connection whatsoever with the plaintiffs' cause of action." On 22nd August 1963 solicitors then acting for the plaintiffs wrote to the defendants demanding " payment of the sum of $11,846/- being the amount due on a running account between yourselves and our client as at 31st December 1961 ". On 30th August 1963 Balwant Singh on behalf of the defendants said in an affidavit " The Statement of Account now produced and shown to me and marked ' A ' is a true statement of the running account between the plaintiffs and the defendants from which it will be seen that the plaintiffs owe to the defendant company $672,748-83." In their Amended Defence and Counterclaim dated 25th March 1964 the defendants said in the first paragraph of their prayer " The defendants repeat the defence and counterclaim the sum of $690,377-66 being the amount due from the plaintiffs to the defendants on a running account between themselves particulars of which have been delivered to the plaintiffs and exceed 3 folios." On 17th November 1966 the defendants gave further and better particulars of their amended counterclaim, setting out at length details of the account which they had kept in their books of the mutual dealings between themselves and the plaintiffs. On 24th April 1967 the plaintiffs delivered a reply and further amended defence to counterclaim, denying the defendants' counterclaim, and saying that " the running account between the plaintiffs and the defendants is a separate and distinct issue altogether from the plaintiffs' claim " and that " the running account between the plaintiffs and the defendants shows a debit balance of $11,846-00 against the defendants ".

Thus it was common ground between the plaintiffs and the defendants that there was a running account between them, and the dispute was as to the scope of it.

The judge's findings with regard to the running account were as follows:

> " From the evidence I find that the dealings between the parties consisted mainly of goods sold and delivered by the defendants to the plaintiffs and of loans from one to the other. The account between them was kept in the ledger of the defendants and the defendants debited the plaintiffs with the cost of the goods as and when they were supplied and with the amount of the loans as and when they were made. The plaintiffs from time to time made payments to the defendants on account generally and credit was given in the ledger for these payments as they were made. The payments were made in varying sums and clearly were not made in respect of any particular debit. The plaintiffs also kept an account in the name of the defendants in which there was a series of credits and debits. The account between the parties is in fact a running account which to the knowledge of both parties is of that kind and kept in that way."

These findings of the judge with regard to the running account were cited and impliedly accepted in the judgment of the Federal Court.

The plaintiffs contended that there is no such claim known to the law as a claim on a running account. Both the judge and the Federal Court rejected this contention. In their Lordships' opinion a claim on a running account would be insufficient as a matter of pleading unless particulars were given either of an account stated (the parties having agreed the amount outstanding) or of the mutual transactions from which the outstanding balance arose. In the present case there was no evidence of an account stated, but extensive particulars were given of the mutual transactions from which the outstanding balance was alleged to have arisen. It was correct to counterclaim the outstanding balance on the running account because (if the figures are right, which is a matter to be investigated in the taking of the account) that was the amount of the debt owing, the amount of the plaintiffs' nett liability, the proper amount to be claimed and recovered. There could be no doubt as to the basis and nature of the counterclaim, and the defendants' pleading was in substance sufficient.

Another contention of the plaintiffs was that the defendants' counterclaim was wholly or mainly barred by limitation under the Limitation Ordinance, and that has been the main contention in this appeal. The contention is that any sum which became payable more than six years before the material date is made irrecoverable by the Limitation Ordinance. It is not necessary for the purposes of this appeal to determine whether the material date would be the date of the issue of the writ or some other date. The plea of limitation was rejected by the trial judge and by the Federal Court on the ground that there was a running account and payments had been made within the six-year period as part payments in respect of the outstanding balance as it was from time to time and the period of limitation for such balance would run from the date of the last of such payments. Reliance was placed on section 26 (2) of the Limitation Ordinance 1959 providing that:

> " where any right of action has accrued to recover any debt or other liquidated pecuniary claim—and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment."

Reliance was placed also on the judgment of Buckley J. in the case of *In re Footman Bower and Company Limited* [1961] Ch. 443. The judge said it was clear from that case " that where there is a running account and a payment is made on account generally it is a payment on account of the whole balance outstanding at the date of the payment and therefore the payment is ' in respect of ' that balance for the purposes of section 26 (2) of the Limitation Ordinance, 1959, so that time started to run afresh on the occasion of each payment ".

This conclusion was affirmed by the Federal Court, and in their Lordships' opinion it follows naturally and correctly from the judge's findings of fact (which have been set out above) as to the nature of the running account and how it was operated. There were mutual dealings between the parties and payments from time to time on account of the outstanding balance. Such payments were within the meaning of section 26 (2) of the Limitation Ordinance part payments " in respect " of the outstanding balance, and so, as the judge said, time started to run afresh on the occasion of each payment.

There is however a question of some difficulty as to the sufficiency of the defendants' pleading with regard to the issue of limitation. On the first day of the trial, 2nd May 1967, the defendants' counsel asked for and

obtained leave to deliver a reply to the plaintiffs' amended defence to counterclaim—in effect a reply to the plaintiffs' plea of limitation. Paragraph 1 of this reply, after a joinder of issue, alleged that " if the claim is otherwise barred by limitation, which is denied, the plaintiffs by their affidavit of the 20th August 1963, have claimd that the defendants' debt, if it arises, arises on a running account which of itself is an acknowledgment of the said debt and a promise to pay." Paragraph 2 of the reply pleaded oral acknowledgments. The language of paragraph 1 is obscure: it is not clear whether the relative clause at the end—" which of itself is an acknowledgment of the said debt and a promise to pay "—relates to the affidavit or to the plaintiffs' claim or to the running account. The defendants were relying somehow on the running account or the plaintiffs' reference to it in their affidavit as defeating the plea of limitation, but apparently they were relying on it as involving an acknowledgment, and there was not, expressly at any rate, any pleading that there were part payments in respect of the outstanding balance. The judge held that there was no acknowledgment.

Their Lordships have no doubt that there ought to have been in the defendants' reply an express allegation of part payments in respect of the outstanding balance. The question is whether this defect in a pleading is now, when the course of events at the trial and in the Federal Court and the long delays which have occurred are taken into account, a sufficient ground for setting aside the judgments and ordering a new trial.

At the trial the fact that there was a running account, in the sense of a series of mutual dealings with debits and credits on both sides, must have been in the minds of all concerned. Apparently the record of the running account as kept in the books of the defendants, though available, may not have been considered in detail but extensive particulars of the account showing the debits and credits had been delivered. The hearing lasted for five days. There was oral evidence at length from Balwant Singh on the one side and from Inder Singh on the other side. There were opening and closing speeches from both counsel.

It appears from the careful notes kept by the judge that the case of *In Re Footman Bower and Company Limited* (*supra*) was mentioned for the first time in the course of the defendants' counsel's closing speech but some time before the end of that speech and before an adjournment, so that plaintiffs' counsel had an opportunity of considering the position. Their Lordships have been informed (and the information has been confirmed by affidavit) that after the end of defendants' counsel's closing speech plaintiffs' counsel applied for leave to reply on the case of *In Re Footman Bower and Company Limited* (*supra*) but the application was refused. The application and refusal are not specifically mentioned in the judge's notes, but the last entries in the notes are "*Questions of amendments to pleadings*—either made by consent or on terms. C.A.V." One cannot be sure as to the exact meaning of those entries, but they must at least indicate that immediately before the judge reserved judgment his attention was directed to the state of the pleadings or at any rate he had it in mind. That was on 8th May 1967 and on 22nd May 1967 he gave his reserved judgment, deciding in favour of the defendants and making an order for an account to be taken.

The point as to the insufficiency of the defendants' pleading was clearly and cogently taken in the plaintiffs' memorandum of appeal to the Federal Court as follows:

> " That the learned trial Judge erred in finding that the Plaintiffs' defence of limitation failed by reason of part payments made by the Plaintiffs to the Defendants on account generally. Such part payments

were not pleaded by the Defendants who relied in their Reply to Further Amended Defence to Counterclaim, solely upon certain specified alleged acknowledgments, and accordingly no evidence was led as to the number or nature of the alleged part payments and no cross-examination or legal argument was directed thereto. In the circumstances the learned trial Judge was wrong in applying the case of *Re Footman Bower & Co. Ltd.* (1961) 2 A11 E.R. 162 and so deciding against the Plaintiffs on the issue of limitation."

In the Federal Court Ambrose J., delivering the judgment of the Court, dealt with the point in this way:

> " It is true that the part payments made by the plaintiffs to the defendants on account generally are not expressly pleaded in the defendants' reply to the defence to counterclaim. But it seems to me in relying on a running account, which was admitted by Inder Singh, the managing director of the plaintiff company, in his affidavit of the 20th August, 1963, the defendants were clearly relying on the part payments to be found in the running account, particulars of which were supplied to the plaintiffs: see pages 10 to 47 of the Appeal Record. In my opinion, the plaintiffs were fully aware that the defendants were relying on these part payments. In my judgment, the trial Judge was perfectly right in applying the case of Re Footman Bower & Co. Ltd. and deciding against the plaintiffs on the issue of limitation. I would add that, in my view, the trial Judge was right in treating the part payments as made on account generally and not on account of any particular items, because the only liability was in respect of a balance due on current account."

Thus it appears that both the learned judge and the Federal Court had in mind the state of the pleadings, and The Federal Court at any rate had specifically in mind the lack of an express allegation by the defendants of part payments on account of the outstanding balance. In proceeding to decide on the facts of the case notwithstanding the defect in the defendants' pleading, that the plea of limitation was defeated by such part payments they were exercising a discretion. In all the circumstances their exercise of the discretion seems reasonable. At any rate their Lordships are not persuaded that the discretion was not judicially exercised or that there was any miscarriage of justice.

There was also a point taken in this appeal to the effect that the defendants should not have been allowed to give evidence of certain transactions because they had not complied with an order or orders for particulars. This was however a matter of discretion, and the fact that eventually the defendants had, generally at any rate, given extensive particulars could properly be taken into account. There is no substantial ground of appeal on this point.

Their Lordships accordingly dismiss this appeal. As the defendants have not opposed the appeal, and it does not appear that they have incurred any costs in relation to it, no order is made with regard to costs.

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In the Privy Council

BAJAJ TEXTILES LIMITED

v.

GIAN SINGH & COMPANY LIMITED

DELIVERED BY

LORD PEARSON

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