Privy Council Appeal No. 22 of 1938

E. L. Ebrahim Lebbe Marikar - - - - - - *Appellant*

v.

S. Arulappa Pillai - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH MAY, 1939

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN

[*Delivered by* LORD ROMER]

This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated the 27th September, 1937, affirming a decree of the District Court of Colombo dated the 6th February, 1936, in an action brought by the respondent against the appellant. The action was founded upon a mortgage bond dated the 21st March, 1930, executed by the appellant in favour of one H. B. Phillips and assigned by Phillips to the respondent on the 16th April, 1930. By his answer to the respondent's plaint the appellant raised various defences of which the only one now material to be considered is as follows. He alleged that he and Phillips, who is a broker, entered into certain forward contracts for the sale and purchase of rubber on the understanding that there should be no delivery or acceptance of the rubber purported to be sold or bought but that the contract should in each case be performed by the payment of the difference between the contract price and the market price on the due date, and that the bond in question was granted for the purpose of securing the payment to Phillips of a sum then owing to him by the appellant in respect of some of such differences. The appellant, in other words, was alleging that the bond in question was given for the purpose of securing money due from him to Phillips under a wagering contract and was in consequence unenforceable. This defence was rejected by the District Judge, and on appeal by the Supreme Court.

It is not contended by the appellant that any misdirection as to the law applicable to the case is to be found either in the judgment of the District Judge or in that of the Supreme Court. All that he alleges is that both Courts arrived at an erroneous conclusion of fact in finding, as they

did, that no such wagering contract was ever entered into between Phillips and the appellant. But in the face of such concurrent findings of fact in the Courts below it is incumbent upon the appellant to satisfy their Lordships without any shadow of doubt that such findings were erroneous. This in their Lordships' opinion the appellant has failed to do.

It is true that the appellant from time to time entered into forward contracts for the purchase of rubber from or through Phillips in such large quantities as to suggest that he did not intend that all of it or even the larger portion of it would ever be taken up by him. His intention no doubt was to resell the rubber before the date of delivery, hoping of course to resell at a profit. His hopes in this respect were seldom realised, but in the large majority of cases the resales were effected although at a loss. When therefore he said in his evidence before the District Judge that he never intended to take or deliver the rubber his evidence may be accepted. But it takes two to make a wagering contract, and if the appellant is to succeed he must show that it was a term of the arrangement between him and Phillips that no rubber was to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of differences. The answer to the question whether there was such an arrangement or not must obviously depend upon the oral evidence given by the appellant and Phillips. Certainly there was none in writing. As to the oral evidence the learned District Judge said this:

> " The Defendant states that it was not intended that there should be any delivery of rubber but that he had arranged with Mr. Phillips that it was only the difference in price that was to be accounted for. Mr. Phillips denies this. I cannot for a moment believe that Mr. Phillips himself entered into any wagering contract. He was merely concerned to earn his brokerage. . . ."

Then a little later he said this:

> " It is quite conceivable that a rubber dealer may buy a quantity of rubber under a forward contract and if before the date of delivery he finds it advantageous to himself to sell he would sell, so that in the result he does not actually handle the rubber. Mr. Phillips has stated that in all these contracts there was the rubber actually in existence, delivery being ultimately made to the final purchaser who chose to take delivery instead of in his turn selling beforehand."

And again:

> " This is not a case of buying and selling without the actual article being available. The article was always available for delivery."

The same view of the evidence was taken by the Supreme Court. Hearne J., in whose judgment Maartensz J. concurred, after pointing out that the District Judge had expressly rejected the evidence of the appellant upon the matter, said:

> " Of the two witnesses Mr. Phillips and the Defendant the judge has believed the former, that the contracts were not wagering contracts and that therefore the transactions between them did involve the obligation to take up or deliver rubber contracted to be bought or sold."

He then referred to certain parts of the evidence given by Phillips and the appellant and summed it up by saying that in his opinion the Judge was justified in rejecting the defence set up. The appeal was accordingly dismissed with costs.

The District Judge had the great advantage of hearing the evidence of these two witnesses at first hand and of observing their demeanour in the witness box. Having done so he unhesitatingly accepted the evidence of Phillips in preference to that of the appellant whom he was unable to regard as a witness of truth. In these circumstances it would be quite impossible for their Lordships to differ from the conclusions at which he arrived, even if, and this is very far from being the case, they felt inclined so to do on an examination of the printed evidence before them. In these circumstances their Lordships are of opinion, and will humbly advise His Majesty, that the appeal should be dismissed.

The appellant must pay the respondent's costs of the appeal.

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DELIVERED BY
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