[IN THE PRIVY COUNCIL]

1952 *Present :* **Lord Normand, Lord Tucker, Lord Asquith of Bishopstone, Lord Cohen**

M. A. ABDUL SATHAR, Appellant, *and* W. L. BOGTSTRA *et al.*, Respondents

PRIVY COUNCIL APPEAL NO. 19 OF 1951

S. C. 441—D. C. Colombo, 16,684

Appeal—Finding of fact by trial Judge—Rule of non-interference by appellate Court—Contract of service—Distinction between "share of profits", "commission" and "bonus"—Evidence Ordinance (Cap. II), ss. 34 and 157.

Where the disbelief of a witness is based on the ground that the witness has contradicted himself and where on examination the contradictions do not amount to anything more than an incapacity to explain or remember certain facts, an appellate Court is entitled to examine the evidence afresh and arrive at an independent decision. Where, however, the trial Judge's acceptance of the story told by one of the parties is based largely on his impression of the demeanour of that party and not solely on the ground that the opposite party has contradicted himself, the appellate Court will not disturb the finding of fact of the Court of first instance.

In a contract of service, the distinction between "share of profits" and "commission" on the one hand and "bonus" on the other is that the two first expressions relate to a legal right, whereas the last expression refers generally to an *ex gratia* payment.

***Semble*: Under sections 34 and 157 of the Evidence Ordinance entries in books of account kept in the course of business are admissible for corroborating the evidence of the person who made such entries.**

APPEAL from a judgment of the Supreme Court.

D. N. Pritt, Q.C., with *Frank Gahan, Q.C.*, and *G. Le Quesne*, for the plaintiff appellant.

N. R. Fox-Andrews, Q.C., with *Stephen Chapman*, for the defendants respondents.

Cur. adv. vult.

May 26, 1952. [*Delivered by* LORD COHEN]—

The appellant entered the service of the respondents in 1937 at a salary of Rs. 150 per month plus a "dearness allowance" which their Lordships understand to mean a cost of living allowance. It was also the practice of the respondents to give their employee an annual X'mas bonus.

The business of the respondents was divided into departments, the appellant being employed in a department which is called sometimes the Sundries Department, sometimes the Import Department and sometimes the General Import and Sundries Department. According to the appellant he saw opportunities of developing a particular kind of business described as indent business and approached the 1st respondent towards the end of 1939 with the suggestion that he (the appellant) should receive an addition to his remuneration. He alleges that an agreement was reached that he should receive in addition to his fixed salary and dearness allowance an eighth share of the nett profits of his department. He contends that this agreement remained in force until he left the service of the respondents on the 31st December, 1944, subject only to two variations: (*a*) that in 1940–41 there was imposed for a short time a 10 per cent. cut in fixed salary and (*b*) that it was agreed early in 1944 that his fixed salary including dearness allowance should thenceforth be Rs. 500 per month.

The respondents admit the allegations as to the fixed salary but deny that the appellant had any legal claim to anything over and above it.

The evidence establishes beyond dispute that the appellant received or was credited with certain sums in the books of the respondents at the end of each of the financial years ending on the 31st March, 1941, 1942 and 1943, respectively, the amounts involved being in 1941 Rs. 5,000, in 1942 Rs. 5,000 and in 1943 Rs. 4,000. These sums were in addition to his fixed salary, any X'mas bonuses and a special bonus given to all employees to celebrate the silver jubilee of the 2nd respondent, but the respondents allege that they were *ex gratia* payments as a reward for hard work and that the appellant could not have sued to recover them had they not been paid.

On the 29th November, 1944, the respondents wrote to the appellant purporting to confirm an agreement that he should resign from the firm at the end of 1944 and stating that his services would not be required after the 31st December, 1944. The appellant denies that any such agreement was made but he did in fact leave the respondents' service on the 31st December, 1944.

Without waiting for that date his proctor wrote on his behalf on the 4th December, 1944, a letter which did not mention the specific claim to an eighth share of the profits of his department but contained the following paragraphs :—

> " I am prepared to advise my client, without prejudice, to terminate his services immediately, waiving salary for the current month and bonus, on condition that you settle what is due to him as commission immediately.
>
> My client joined your Firm in the Import Department in 1937 on a salary of Rs. 150 per month plus an annual bonus. By 1940–41, however, by my client's unquestioned efficiency and business knowledge, experience and general acumen the Firm was able to turn out a substantial profit out of which you paid my client Rs. 5,000 as commission he had earned and was lawfully entitled to on the basis agreed upon—In 1941–42 the turn over was again just as satisfactory and you paid my client a similar amount. In the following year 1942–43 trading conditions suffered a slight set back and you were able to pay my client only Rs. 4,000.
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> It was during that period that Mr. Sathar on your behalf was away from Ceylon for 8 months and it is clear that it was a case of cause and effect ; but in 1943–44 you netted a profit in the neighbourhood of 2½ lakhs and there is due to my client as even minimum commission a sum of Rs. 25,000 more or less which I have to request you to forward me at your earliest. "

The respondents by their proctor on the 15th December, 1944, repudiated any liability for anything beyond the fixed salary to the end of December, 1944.

On the 22nd December, 1945, the appellant issued his plaint claiming in effect : (*a*) fixed salary of Rs. 500 for the month of December, 1944 ; (*b*) damages for wrongful dismissal amounting to three months salary, i.e., Rs. 1,500 ; (*c*) an account of the profits of his department for the period 1st April, 1943, to the date of his dismissal, viz., 31st December, 1944, and payment of a sum equal to one-eighth of such profits ; (*d*) an account of the profits earned by his department in transactions arranged or executed by him before the 31st December, 1944, in respect of goods delivered or performance completed after that date. The case came on for hearing before the District Court, Colombo, on the 28th May, 1947. The appellant gave evidence in support of his plaint in the course of which he definitely asserted that the 1st respondent on behalf of the respondents had made the verbal agreement alleged in the plaint. He put in various

entries from the respondents' books which he said supported his claim. Thus in the personal ledger (see P. 4 & P. 5) there appear the following entries :—

" Jan. 4th, 1941 advance against commission—Rs. 2,500.
July 14th, 1941 cash in settlement of commission—Rs. 2,399·53.
Oct. 30th, 1943 cash in settlement of commission—Rs. 8,500 ".

On the other hand it should be noted that in the same account on the opposite side appear these entries :—

" March 31st, 1941 by bonus—Rs. 5,000.
March 31st, 1942 by bonus—Rs. 5,000.
March 31st, 1943 by bonus—Rs. 4,000 ".

He also produced two statements of profits of his department which he said had been handed to him by the 1st respondent when they were discussing what he was entitled to for his share of profits. The first (P.6) showed a profit for 1940/41 of over Rs 57,000. The second showed the profits for the three years 1940/41, 1941/42 and 1942/43 ; the profits for the two latter years aggregating respectively about Rs 106,000 and Rs 40,000. If the one-eighth calculation is applied to these figures the amount arrived at is substantially larger than the amounts actually credited to him in each year and the ratio between these amounts is very different to the ratio of the profit figures for the respective years. The appellant sought to explain these discrepancies by stating that he accepted deductions which the 1st respondent said ought to be made in respect of such matters as working expenses, excess profits and income tax, and that the figures for the last two years were treated as an aggregate.

He also produced two counterfoils which corroborated the entries in the books of the respondents that the Rs. 2,500 paid to the appellant on the 4th January, 1941, was an advance against commission and that the Rs. 2,399·53 paid him on the 14th July was in settlement of his commission. According to the evidence of the respondents' former book-keeper who was called on behalf of the appellant and was not cross-examined the first counterfoil was in the handwriting of the 2nd respondent and the second counterfoil which was in the book-keeper's handwriting was initialled by the 1st respondent.

The appellant also put in some entries from a daybook (P. 9) which he had kept in connection with a business formerly carried on by him at Diyatalawa and in which he had, until he closed down that business, made certain entries as to his receipts from the respondents. Under date 4th January, 1941, he records the receipt of Rs. 2,500 as " being part advance on commission due ". Under date 16th July, 1941, he records the receipt of Rs. 2,399·53 as " By Hong Kong bank cheque " and under the same date appear in oppcsite columns the following entries :—

" B & De W's a/c (M. A. A. S. a/c)
To amt. due on commission a/c
for the year 1st April 1940
to 31st March 1941 to M. A. A. Sathar ..5,000·00

M. A. A. Sathar

By amt. received from B & De W towards commission for year 1st April 1940 to 31st March 1941 based on $\frac{1}{8}$th share of a nett profit of Rs. 40,000/- for the Sundry department.. 5,000·00 ".

Again under date 20th December, 1941 appears the entry :

" B & De W's a/c

By Hong Kong Bank cheque being advance towards amount due to me on profit for year 1941–42 .. .. .. 500·00 ".

No objection was taken to the admission of these entries.

The 1st respondent was the only witness called for the respondents although the 2nd respondent was living in Ceylon and appears clearly to have been available. The 1st respondent denied the alleged agreement. He admitted that the statement of profits (P. 6) was in his handwriting but denied having handed it or the statement of profits (P. 8) to the appellant. He gave what the Trial Judge thought a wholly unsatisfactory explanation of the purpose for which he had prepared the document P. 6. He denied having told the appellant that Rs. 17,000 should be deducted from the profits shown in P. 6 as expenses. He was less explicit in his denials as to P. 8, for he says " I might have given him an idea of the situation when he spoke to me about his bonus ".

He was unable to give any satisfactory explanation as to why the 2nd respondent had entered " advance against commission " in the counterfoil (P. 2) and could only say about the entry on 14th July, 1941 " cash in settlement of commission " that it was a mistake in so far as it used the word " commission ".

Having heard the evidence the learned Judge on the 23rd June, 1947, gave judgment in favour of the appellant except on the issue of damages for wrongful dismissal. As the appellant does not now seek damages for alleged wrongful dismissal their Lordships need not refer again to that issue.

On the main point, viz., the appellant's claim to a share of profits the learned Trial Judge unhesitatingly found for the appellant. As their Lordships read his judgment he bases himself largely on his estimate of the credibility of the appellant and the 1st respondent respectively. On this point he says :—

" Plaintiff gave his evidence quite well. He did not contradict himself on any material point. As for the 1st defendant he was most unreliable in the witness box. He contradicted himself more than once and said things that could not possibly be true. For a Dutchman he was extraordinarily voluble, but it must not be thought that he was handicapped by reason of unfamiliarity with the English language. In fact, his knowledge of English seemed to be very good. He certainly showed a nice appreciation of the word ' insistence '. He said with reference to the Diyatalawa business, ' The books were

audited but that was done on my urgent request'. Realising that urgent request was not the correct expression, he added, 'On my insistence that was done'.

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

He places some reliance on one of the entries in the plaintiff's day book (P. 9) for after reading the entry for the 20th December, 1951, he says :—

"About the genuineness of this entry there can be no doubt and it proves the plaintiff's statement that the sum of Rs. 500 was not an advance against salary but an advance payment on account of profits."

Again he says :—

". . . . plaintiff's book of account supports the plaintiff's story that the amounts received by him were on account of profits earned by his department and not as bonus."

From this decision the respondents appealed. Their Lordships do not find it necessary to refer to the notice of appeal further than to point out that the respondents did not by it object to the admission of the entries in the appellant's day book (P. 9) but merely to its admissibility except as corroboration of the appellant's evidence.

The appeal came before the Supreme Court and on the 25th April, 1949, the Supreme Court (Nagalingam and Gunasekara JJ.) reversed the decision of the Trial Judge and dismissed with costs the appellant's action in excess of the Rs. 500 admitted to be due for salary.

Nagalingam J. with whom Gunasekara J. concurred, commenced his judgment by stating his view of the law applicable where an Appellate Court is invited to reverse a Trial Judge on a question of fact. He said :—

"This appeal involves a question of fact. It is a well established principle that an appellate tribunal would not ordinarily interfere with the finding of fact of a Court of first instance : but this principle is not without exception. Where the facts are such that the appellate tribunal is itself in as good a position as the original Court to sift and weigh the evidence and where in particular the oral testimony has not received in the lower court that consideration which should have been bestowed on it in the light of the attendant circumstances 'which cannot lie' the appellate tribunal would not feel itself trammelled by the trial Judge's views in reaching on its own a decision on appeal. Besides where the disbelief of a witness expressed by the trial Court is based upon demeanour that is a strong circumstance which the appellate Court would give full weight to ; but where that disbelief is based on the ground that the witness has contradicted himself and where on examination the contradictions do not amount to anything more than an incapacity to explain or remember after a period of years certain facts, the appellate tribunal would be the more unfettered to examine the evidence afresh and arrive at an independent decision."

With that statement of the law (which in substance agrees with the opinions expressed by the House of Lords in *Watt or Thomas v. Thomas* [1947] A.C. 484) their Lordships are not disposed to quarrel but they are unable to agree that the Supreme Court has correctly applied it to the facts of the present case. Reading the judgment of the Trial Judge as a whole their Lordships find it impossible to agree that his disbelief of the 1st respondent was based solely on the ground that the 1st respondent had contradicted himself or that the contradictions amount to nothing more than an incapacity to explain or remember certain facts. Their Lordships consider that the passage from the judgment of the Trial Judge which they have cited and indeed his judgment read as a whole indicate that his acceptance of the story told by the appellant was based largely on his impression of the demeanour of the appellant.

It is to be observed that the Supreme Court dismissed the appellant's action not merely on the ground that he had failed to prove the case he pleaded but also in their acceptance of the truth of the evidence given by the 1st respondent. Mr. Fox-Andrews for the respondents, as their Lordships think wisely, did not attempt to support that portion of the judgment of the Supreme Court. He recognised that the 1st respondent's evidence was full of inconsistencies for which no satisfactory explanation could be given. He submitted that the case should be approached on the basis that the 1st respondent's evidence should be ignored and that the oral evidence adduced on behalf of the appellant and the documents before the court should then be examined to see whether they established the case which the appellant alleged.

Mr. Fox-Andrews had of course to admit that taking the appellant's oral evidence alone it proved his claim to an eighth share of the profits but he said that when it was examined in the light of the documents which in the language of Nagalingam J. " cannot lie " it would be found that the oral evidence could not be accepted.

As a preliminary he considered the meaning of the three expressions " share of profits ", " commission " and " bonus ". The first, he said, is unambiguous. The second, he suggested, is ordinarily applied to a right to a percentage of the sale price of goods. Both these expressions, he agreed, are normally used in relation to contracts giving a legal right to an employee to a share of profits or commission. " Bonus " on the other hand is, he said, normally used in relation to an *ex gratia* payment made at somebody's discretion, in the relevant context at the discretion of an employer.

Their Lordships are not disposed for the purposes of the present case to dispute the correctness of this suggested dictionary subject to the reservation that they think that the expression " commission " is not infrequently used in relation to a commission on profits. The important distinction to bear in mind is in their Lordships' opinion the distinction between " share of profits " and " commission " on the one hand and " bonus " on the other, the two first expressions relating to a legal right, the last referring generally to an *ex gratia* payment.

Turning to the extracts from the respondents' books their Lordships find that the expression " commission " and " bonus " are both used, but in the counterfoils with each of which one or other of the respondents is personally identified the expression used is " commission ". Their Lordships are unable therefore to extract from the respondents' books and documents anything which is necessarily inconsistent with the appellant's oral evidence. They agree, however, with Mr. Fox-Andrews that these entries do not of themselves support the vital allegation that the commission to which the appellant is entitled is an eighth of the profits of his department.

For that he is dependent on his verbal evidence, and, if they are admissible, on the entries in his day book (P.9). As their Lordships have already said no objection was taken to their admissibility either before the Trial Judge or before the Supreme Court. Mr. Fox-Andrews now seeks to exclude them. Mr. Pritt submits that the objection comes too late but he also argued that in any event they are admissible under sections 34 and 157 of the Evidence Ordinance (Cap. 11 of the Revised Edition of the Legislative Enactments of Ceylon). These sections read as follows :—

> " 34. Entries in books of account, regularly kept in the course of business, are relevant, whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability. "
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> " 157. In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved. "

Their Lordships find it unnecessary to reach a conclusion on this last argument as they are satisfied that they ought not at this late stage to sustain Mr. Fox-Andrews' objection. They have not the advantage of any opinion of the Ceylonese courts on the point, but they have the fact that the present respondents' counsel in their notice of appeal to the Supreme Court appear to have recognised that the entries would be admissible for corroborating the present appellant's evidence. Their Lordships will assume that this contention of the respondents is well founded. The appellant has given express evidence which if accepted justifies the learned Trial Judge's judgment. As their Lordships read that judgment, he treated the entries in P. 9 as supporting the veracity of the appellant's evidence and their Lordships consider that he was entitled so to do.

There are certain other matters on which Mr. Fox-Andrews laid great stress, in particular the discrepancy if the appellant was entitled to an eighth of the profits of his department, between an eighth of such profits as shown in P. 6 and P. 8 and the sums actually paid to the appellant. This criticism has much force, but no doubt it was made to the Trial Judge and after considering all the elements, the Trial Judge accepted the appellant's evidence. In their Lordships' opinion the Supreme Court applying the principles which they themselves enunciated ought not to have interfered with his conclusion.

Their Lordships would add that however excellent a Judge's note of evidence may be (and the note in the present case appears to their Lordships to have been both fully and carefully made), the cases must indeed be rare where, no transcript being available, the Appellate Court in a case involving the veracity of a witness can properly disturb the finding of fact of the Trial Judge who made the note.

There is, however, one subsidiary matter on which in their Lordships' opinion the Trial Judge fell into error and that was in allowing the respondents an account of the profits on transactions commenced during the period of the appellant's employment with the respondents but not completed until after the termination of that employment. Their Lordships think that the proper inference from the evidence is that under the agreement between the parties the commission would only be payable on profits of the department which would be brought into the Profit and Loss account of the business if the financial year of the company ended on the date of termination of the employment.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed and the judgment of the Trial Judge be restored subject to the exclusion of the paragraphs decreeing that the respondents do render an account to the appellant of the profits earned by the General Import and Sundries Department in all transactions arranged or executed by the appellant and on all contracts put through by him before the 31st December, 1944, in respect of goods delivered and/or performance completed after the 31st December, 1944, and that in default of rendering the said account of the said profit the respondents do pay to the appellant the sum of Rs. 3,125.

The respondents must pay the costs of the appellant of this appeal and in the Supreme Court of Ceylon.

Appeal allowed.