

[IN THE PRIVY COUNCIL.]

1941 Present : Lord Atkin, Lord Thankerton, Lord Romer, Sir George Rankin, and Sir Sidney Abrahams.

BARTLEET AND COMPANY *v.* ISMAIL LEBBE
MARIKAR EBRAHIM LEBBE MARIKAR

Privy Council Appeal No. 93 of 1939.

*Wagering transaction—Documents show an ordinary commercial transaction—
one party only benefits by commission—Inference of bet rebutted.*

Where, on a question whether a transaction between parties is a wagering transaction, the documents show an ordinary commercial transaction and in conformity with them one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of the price but can only benefit by his commission.

Held, that the inference that the transaction is a betting transaction is effectively destroyed.

A PPEAL from a judgment of the Supreme Court.

December 5, 1941. (Delivered by LORD ATKIN).—

This is an appeal from the Supreme Court of Ceylon (Poyser and Wijeyewardene JJ.), who affirmed a decree of the District Judge of Colombo in favour of the plaintiffs in an action on a mortgage bond. The defence was that the sum mentioned in the bond was an amount due as the result of wagering transactions on the price of rubber. There has been no dispute at any time in the present action that in accordance with the law of Ceylon as decided in the Supreme Court in *Tarrant v. Marikar*¹ such a plea if established would be a valid defence. The only question in the case is one of fact, whether the transactions between the parties were wagering transactions, in other words, were bets. Both Courts decided this issue in favour of the plaintiffs in judgments which fully discuss the facts, and it is only necessary shortly to state the circumstances which gave rise to the action.

The defendant is a grower of rubber in Ceylon: the plaintiffs are a long-established firm of share and produce brokers, members of the Colombo Brokers' Association and of the Colombo Rubber Traders' Association. The defendant alleges that in May, 1929, it was arranged between him and one Perera, who at the time was a Ceylonese broker

¹ (1934) 36 N. L. R. 145.

employed by the plaintiffs' firm, "that Perera should buy rubber for him on the London market." "There was to be no delivery the arrangement was that I should pay the differences when the market was against me and that I should be paid the differences when the market was in my favour." Mr. Parsons, the senior partner of the firm, denied that he had ever entered into any such bargain. Perera, who at the hearing of the case had left the plaintiffs' employment, was not called.

The evidence showed that on May 15, 1929, the defendant wrote to the plaintiffs the following letter :—

E. L. Ebrahim Lebbe Marikar.
Phone No. 1438.

9, Gas Works Street,
Colombo, 15th May, 1929.

Messrs. Bartleet & Co.,
Colombo.

Dear Sir,

As arranged please buy 700 (seven hundred) tons Rubber on London June-December, 1929, at the rate of 100 (one hundred) tons each month at the current market rate and also I allow you to have the selling as well.

Yours faithfully,
E. L. EBRAHIM LEBBE MARIKAR.
(Signed)

The plaintiffs carried out these instructions by cabling to their London agents, George White, Yuille & Co., Ltd., "Please buy for our account delivery in equal monthly lots 700 tons June-December delivery this year". Yuille & Co. carried out these instructions, and as the rubber was bought sent contracts to the plaintiffs, of which the following is a sample :—

Geo. White, Yuille & Co., Ltd.,
3, Mincing Lane, E.C. 3.
2079

Messrs. Bartleet & Co.

BOUGHT DELIVERY CONTRACT.
London and/or Liverpool.
London, May 15th, 1929.

We have this day bought by your Order and for your account upon the terms of this Contract, including the Rules endorsed hereon and the Regulations and Bye-laws of the Rubber Trade Association of London, of our Principals, whose solvency we guarantee :

Seventy-five (75) tons Plantation Rubber.

in cases, @ Elevenpence seven-eighths (11 7/8d.) per lb.
Standard Quality Hevea Brasiliensis, Ribbed Smoked Sheets.
To be ready for delivery in Warehouse in London and/or Liverpool,
any time or times, at Seller's option, during the month of June, 1929.

(File)

Any dispute arising out of this contract shall be settled by Arbitration in London, according to the Regulations and Bye-laws of the Rubber Trade Association of London. This Contract shall be construed according to the laws of England, whatever be the residence or nationality of the parties, and its performance shall, in every part and incident, be considered due in England for the purpose of jurisdiction, and the Courts of England or arbitrators in England, as the case may be, shall have conclusive jurisdiction over all disputes which may arise under this Contract, and their decisions shall be enforceable as final judgments in any British Colony or Dependency or Foreign Country.

Brokerage Nil per cent.

For and on behalf of
GEO. WHITE YUILLE & Co., LTD.,
(Signed) A. H. HAMILTON, Director,
Brokers.
Members of the Rubber Trade
Association of London.

It was in evidence that to buy in London it was necessary for the Ceylon broker to pledge his credit, as the London brokers were not interested in the Ceylon broker's client, the foreign principal. The plaintiffs duly reported the transactions to the defendant by a series of contracts, of which the following is a sample:—

Bartleet & Co.

RUBBER CONTRACT.

Contract No. 1158/29.

Colombo, 16th May, 1929.

E. L. Ebrahim Lebbe Marikar, Esq.,
Colombo.

We have this day bought by your order and for your account from ourselves (300) Three hundred tons Plantation Rubber, in cases, at 1s. $\frac{3}{4}$ d. per lb. Standard quality.

To be ready for delivery in Warehouse in London and/or Liverpool any time or times, at Seller's option, during the months of October/November/December, 1929.

22/11 Oct. Dry 100 tons.

Nov. 100 "

Dec. 100 "

This Contract is made under and subject to the Constitution, Bye-Laws and Rules of the Rubber Trade Association of London, and is further subject to the Conditions endorsed on the back hereof; and

any dispute arising out of this Contract shall be settled by Arbitration in accordance with the aforesaid Rules.

Five cent Stamp.

Brokerage $\frac{1}{2}$ per cent.

BARTLEET & CO.,

Ceylon

(Copied) (Signed)

Brokers.

When the due date arrived for the various purchases, in accordance with the practice, as no instructions for taking delivery were given, the rubber was sold by Yuille & Co. The plaintiffs became liable to Yuille & Co. for the difference which in every case they remitted by telegraphic transfer. They rendered monthly accounts to the defendant showing the amount of the differences and debiting the defendant as well with the cost of cables and with their buying and selling commissions of $\frac{1}{2}$ and $\frac{3}{4}$ per cent., respectively. They also charged interest at 9 per cent. on the amount which they had themselves paid London, from the time of payment. These accounts were paid by the defendant until the two final accounts for November and December deliveries, which amounted to the sum for which the defendant eventually gave the bond in question. On these facts it is hardly surprising that the District Judge disbelieved the defendant's story that his arrangement with Perera was a bet. The essence of a bet is that both parties agree that they will pay and receive respectively on the happening of an event in which they have no material interest. The transaction may be cloaked behind the forms of genuine commercial transactions: but to establish the bet it is necessary to prove that the documents are but a cloak and that neither party intended them to have any effective legal operation. Where the documents show an ordinary commercial transaction, and in conformity with them one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases the fact that no delivery is required or tendered is of practically no value. It is a circumstance affecting in former days many speculative accounts on the Stock Exchange, London: and since the decision in *Thacker v. Hardy*¹ it has been quite clear that an ordinary speculation conducted on the Stock Exchange through a broker who makes himself by the rules personally liable to the other members of the Stock Exchange for the performance of the contract cannot be a bet. All the judges in Ceylon correctly directed themselves on the law, citing in the Supreme Court one of the latest decisions, that of Hilbery J. in *Woodward & Co. v. Wolfe*², a case of speculation in cotton futures through brokers, members of the Liverpool Cotton Association. The position therefore is that on a pure question of fact there are concurrent findings by both courts in Ceylon in favour of the plaintiffs. In accordance with their Lordships' rule of practice they will not interfere with the decision below on that ground alone,

¹ (1879) 4 Q. B. D. 685.

² (1936) 3 A. E. R. 529.

though as appears from what has been said above it is difficult to see how any other decision could be recorded.

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

