PRIVY COUNCIL.*

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1915.
February 1,
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BOMBAY COTTON MANUFACTURING COMPANY, DEFENDANTS, *v.* MOTILAL SHIVLAL, PLAINTIFF.

[On appeal from the High Court of Judicature at Bombay.]

Appellate Court—Discretion of Appellate Court in the consideration of evidence—Interference with findings of fact of Judge who sees and hears the witnesses, rule as to—Pronouncement of Trial Judge as to credibility of witnesses not to be set aside on a mere calculation of probabilities by Court of Appeal—Relevancy of cross-examination to credit—Trial Judge's opinion on evidence upheld.

Whilst it is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appellate Court, it is, generally speaking, undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses, and has the opportunity of noting their demeanour, especially in cases where the issue is simple, and depends on the credit which attaches to one or other of conflicting witnesses. Nor should the pronouncement of the Trial Judge with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal.

In making these observations, their Lordships said they had no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wished to point out that where the issue is simple and straightforward, and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded.

Cross-examination to credit is necessarily irrelevant to any issue in the action ; its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy. "It is most relevant in a case", their Lordships said, "like the present where everything depends on the Judge's belief or disbelief, in the witness's story : and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow."

On the evidence in the case their Lordships reversed the decision of the Appellate Court, and upheld that of the Trial Judge.

* *Present* :—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

APPEAL 17 of 1914 from a judgment and decree (5th February 1912) of the High Court of Bombay in its appellate jurisdiction, which reversed a judgment and decree (24th July 1911) of a Judge of the same Court sitting in the exercise of its original jurisdiction.

The only question for determination on this appeal was as to whether an item of Rs. 2,00,000 shown in the banking accounts between the appellant Company and the respondent, purporting to be an advance by the latter to the former by way of fixed deposit, was properly debited to the appellant Company.

The respondent was a Banker in Bombay carrying on a large business which was managed and conducted by his munim, Jeynarain Hindumal Dani.

The Agent and Managing Director of the appellant Company up to the time of his death in August 1909, was one Dwarkadas Dharamsey, who was also the Agent and Managing Director of two other companies in Bombay, the Tricumdas Mills Company, Limited, and the Lakhmidas Khimji Spinning and Weaving Company, Limited, both of which were in December 1908 hopelessly insolvent, while the appellant Company was perfectly solvent.

On 28th December 1908 the two insolvent companies were largely indebted to the respondent in respect of advances made by him through Dani (who was himself, and had been from 1905 a Director of the Tricumdas Company) at the instance of Dwarkadas Dharamsey.

There was then due to the respondent by the Tricumdas Company Rs. 1,50,000 on fixed deposit, and Rs. 1,40,000 on current account, and by the Lakhmidas Company on fixed deposit Rs. 1,50,000, and the same amount on current account.

On 26th December Dani suggested to Dwarkadas Dharamsey that the amounts due on current account

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by the two companies should be reduced, and they came to an arrangement to effect that result by shifting the indebtedness of the two companies for Rs. 2,00,000 on to the appellant Company, the respondent thereby having a solvent company instead of an insolvent one as security. No money was intended to pass, nor did any pass in this transaction; but two cheques for Rs. 85,000 and Rs. 1,15,000 were drawn by the Tricumdas and Lakhmidas Companies respectively on the Bank of Bombay in favour of the respondent. These cheques were sent to the cashier of the appellant Company, giving him at the same time instructions not to present them to be cashed by the Bank, and a receipt for Rs. 2,00,000 was given by Dwarkadas Dharamsey as the respondent's agent. Entries were then made in books of the three companies by which it was made to appear that the appellant had received Rs. 2,00,000 in cash from the respondent, the Tricumdas Company appeared to have repaid Rs. 85,000 to the respondent, and to have received Rs. 2,00,000 from the appellant, and the Lakhmidas Company was made to appear to have repaid Rs. 1,15,000 to the respondent, and to have received that sum from the Tricumdas Company. After these entries had been made the two cheques for Rs. 85,000 and Rs. 1,15,000 were destroyed by Dwarkadas Dharamsey without ever having been presented to the Bank for realization. The result of the entries was to make the respondent appear to be a creditor of the appellant Company for Rs. 2,00,000, and to be no longer a creditor of the Tricumdas and Lakhmidas Companies. No consideration whatever was received by the appellant Company in these transactions.

On 27th February 1909 the pretended fixed deposit of Rs. 2,00,000 was renewed by Dani and Dwarkadas Dharamsey for a further period of three months expiring on 27th May 1909, on which date a sum of

Rs. 2,00,000 was paid by Dwarkadas Dharamsey out of the moneys of the appellant Company to and was received by the respondent as being the repayment of the fixed deposit.

After the death of Dwarkadas Dharamsey the appellant Company was compelled to go into liquidation owing to the mismanagement of its affairs by its agent; but subsequently the liquidation proceedings were withdrawn, its business was re-started under new agents, and the facts above stated were discovered in connection with the above transactions.

On 6th April 1910 the respondent brought against the appellant the suit out of which this appeal arose, claiming to recover the sum of Rs. 1,23,769-13-3 as the balance due to him on the accounts between them.

The appellant Company defended the suit, and contended that the item of Rs. 2,00,000 debited to it in the accounts was a fraudulent one, that it did not represent a real transaction, and that the appellant Company was not liable, as upon the accounts being properly taken there would be a balance due to the Company.

The first Court (Beaman J.) as to the nature of the transaction held that it was a fraud upon the appellant Company, to which the respondent's agent was a party, and of which he had full knowledge, that the appellant had received no consideration for the transaction, and was not estopped from raising the case of fraud upon the accounts; and he ordered a reference to the attorneys of the parties to settle the accounts, and to find out how much was due on either side, after excluding the disputed debit item of Rs. 2,00,000; and eventually when the result of the reference was reported, he made a decree directing the respondent to pay to the appellant Company the sum of Rs. 1,17,633 with interest and costs.

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The material portion of the findings in the judgment as to the nature of the transaction, and as to the evidence of the witnesses on either side was as follows :—

"These facts, upon which the defendant Company relies, are established, I think, beyond all reasonable doubt not only by the evidence most reluctantly given by the plaintiff himself under cross-examination, but finally and fatally, by the evidence of Dwarkadas Dharamsey's two sons, Devji Damodhar and Tricumdas Dwarkadas. Very seldom indeed has a party, in these Courts, such serviceable, clear-headed, and as it appears to me absolutely truthful witnesses as these two boys to offer in support of his case. The searching and destructive cross-examination of the plaintiff indeed could have left little doubt as to the true character not only of the man himself but of this transaction. Had any such doubt, however shadowy, remained, it must have been completely dispelled by the evidence of Devji Damodhar and Tricumdas Dwarkadas. And it is noteworthy, that the plaintiff made no serious attempt to shake these witnesses upon any material point of the story they had told. Indeed it was quite evident from their demeanour in the box that any such attempt would have been futile.

Thus then we find that in December 1908, a merely paper transaction was entered into with the object of shifting the plaintiff's security, from the Tricumdas and Lakhmidas Mills to the defendant Company. The evidence of Devji, and in a less degree of Tricumdas, proves most conclusively, that the whole of this transaction was entered into, not only, with the knowledge of, but at the suggestion and deliberate instigation of the plaintiff himself. At that time, as I have said, quite apart from this evidence, it is abundantly clear that he was pressing Dwarkadas Dharamsey for more and better security. Upon that part of the case, we have the evidence of the plaintiff himself, of Devji, and of Merwanji, a member of the firm of Bicknell, Merwanji and Romer, and the diary of the latter. The plaintiff attempted stoutly to maintain that he was not in the least anxious about the security he had for the loans he had made to the Tricumdas and the Lakhmidas Mills, but that as Dwarkadas Dharamsey was taking further loans as well for himself personally as for those Mills, the question of additional security had become important. Merwanji's diary is very significant upon this point. It contains an interpolation showing that the negotiation had reference not only to security for loans made to the Mills, but also for loans to be made *in futuro* to Dwarkadas Dharamsey personally. Now the interview appears to have occurred on the 26th December 1908, and Merwanji says that he dictated his notes 2 or 3 days later without the interpolation and as presumably therefore representing the predominant impression left on Merwanji's mind by that interview. The note entirely supports the defendant's contention, *viz.* :—that the plaintiff was desperately

anxious to obtain further and better security for the monies he had deposited with the Mills. But Merwanji says that Dwarkadas Dharamsey came to him personally and asked to have his note of interview. When the note was read, it was Dwarkadas who suggested making the interpolation. The materiality of this is, of course, to show why the plaintiff had recourse to this curiously involved transaction of the 28th December 1908. The foundation of the plaintiff's case is, that the plaintiff knew that his money in the Tricumdas and the Lakhmidas Mills was very unsafe and desired to exchange his investment there at any rate partially and to the extent of these two lacs for the safe investment in the defendant Company. The plaintiff's case must necessarily largely depend upon the evidence given by the plaintiff himself, weighed against the evidence of the two sons of Dwarkadas for the defendant. I have already expressed the very high opinion I formed both of the truthfulness and clear-headedness of these two boys. Perhaps the less said about the quality of Dani's evidence the better. No one who reads it patiently from beginning to end could doubt that he is a thoroughly unscrupulous, untrustworthy and untruthful man. Yet this is not so apparent upon the paper record as it was while the witness himself was under cross-examination. He is of that class of men, so addicted, I presume, to tortuous and underhand dealings that he is literally afraid to give a plain answer to the simplest question. His examination occupied probably three times as long as it should have done owing to the witness' obstinate prevarication and attempts to fence with every question. It appears to me shocking that a man of such character, as Dani thus revealed himself in the witness box, is to be entrusted in a great commercial city like Bombay with the management of great concerns involving probably the fortunes of thousands of persons. Forming my opinion merely upon the witness' examination here and the facts which have come to light in connection with this dealing, I should say that he, and men like him, enter into and employ all the methods of Western commerce without having the faintest appreciation or sense of commercial honesty, which is usually supposed to underlie and be the basis of our commercial system. We have it, I say, not as a matter of inference, but on the direct and sworn testimony of witnesses who cannot be disbelieved, that the plaintiff himself suggested and insisted upon carrying out this fraud upon the defendant Company so that nothing is left really in uncertainty."

An appeal by the respondent was heard by an Appellate Bench of the High Court (Sir Basil Scott, C. J. and Russell, J.) who held that the appellant Company had failed to make out the case of fraud set up, and they accordingly made a decree for the respondent reversing the judgment appealed from.

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Scott, C. J. (after pointing out that "the defendant's success depends entirely on proof of a fraud between Dwarkadas Dharamsey and Dani, the onus being on the defendant," and submitting the whole of the evidence to a detailed examination) continued :—

"The defendants, however, contend that the transactions in question were in reality part of a fraudulent scheme by which Dani to save his master from loss foisted the liability of the debtor Companies on the defendant Company. If this was Dani's intention it is not clear why he did not withdraw the whole of the plaintiff's money lying on current account with the Tricumdas and Lakhmidas Companies and he continued from January to April to advance large sums to the Tricumdas Company on current account. In January 1909 its indebtedness to the plaintiff on current account increased by Rs. 25,000, in February by Rs. 85,000, in March by Rs. 34,000. In April the plaintiff advanced Rs. 1,30,000 and was paid Rs. 2,35,000. It was only in that month that for the first time in 1909 the payments by the plaintiff to the Company were not largely in excess of his receipts from it.

"The circumstances above detailed appear to us to be inconsistent with any fear on the part of Dani that his master would lose the money which was owing to him by the Tricumdas Company on the 27th of December and to afford no indication of any motive for the perpetration of the fraud attributed to him. Moreover the handing by his son of the two cheques of the debtor companies to the clerk of the defendant Company and the taking of an acknowledgment for the same from Parshotam Jeewandas seems absurd conduct if Dani was not prepared to fulfil his contracts of loans with the defendant Company and knew that the cheques he was handing over would not be honoured.

"The defendant's case does not however depend purely upon inferences to be drawn from the condition of the Tricumdas Company's accounts, for they produce a witness who gives direct evidence in support of the allegations of fraud on the part of Dani. This witness is Devji, the son of Dwarkadas Dharamsey. His story appears in the evidence on page 105 (read). The learned Judge has believed this story and disbelieved Dani's denial of any fraudulent suggestions on his part. He says 'These facts upon which the defendant Company relies are established, I think beyond all reasonable doubt, not only by the evidence most reluctantly given by the plaintiff (*i. e.*, Dani) himself under cross-examination, but finally and fatally by the evidence of Dwarkadas Dharmsey's two sons, Devji Damodhar and Tricumdas Dwarkadas. Very seldom indeed has a party in these Courts such serviceable, clear-headed and as it appears to me absolutely truthful witnesses as these two boys to offer in support of his case. The searching and destructive cross-

examination of the plaintiff indeed could have left little doubt as to the true character not only of the man himself but of this transaction. Had any such doubt, however shadowy, remained, it must have been completely dispelled by the evidence of Devji Damodhar and Tricumdas Dwarkadas and it is noteworthy that the plaintiff made no serious attempt to shake these witnesses on any material point of the story they had told'; and further on he says 'The evidence of Devji and in a less degree of Tricumdas proves most conclusively that the whole of this transaction was entered into not only with the knowledge of but at the suggestion and deliberate instigation of the plaintiff himself.' * * 'We have it . . . on the direct and sworn testimony of witnesses who cannot be disbelieved that the plaintiff himself suggested and insisted upon carrying out this fraud upon the defendant Company so that nothing is left really in uncertainty.'

"This appreciation of the oral evidence has been subjected by the appellant's Counsel to various criticisms and in particular it has been pointed out that the learned Judge was in error in supposing that Tricumdas Dwarkadas gave any evidence relating to the transaction impugned. He only deposed to the taking of a bribe by Dani on a subsequent occasion which evidence was irrelevant and inadmissible, and to transactions in April and May 1908. This criticism appears to us to be sound. Tricumdas is not recorded to have given any evidence relating to the disputed transaction of the 28th of December. We will hereafter discuss the question of the relevancy of his evidence as to bribes. The oral evidence of the impugned transaction therefore resolves itself into assertion by Devji and denial by Dani with, as it seems to us, the probabilities strongly in favour of Dani's story. The onus is on the defendants to make out their case of fraud and we are unable to accept as conclusive the judgment of the lower Court as to the veracity of the defendant's witness That Devji was a prepossessing witness and that Dani gave his evidence badly may be conceded without affecting our final conclusion. Dani came into the box knowing that he was charged with the commission of a fraud and was at once attacked in a searching cross-examination upon his weakest spot, the balance sheet of 1907, not a very relevant point in our opinion but a point upon which he was quickly placed in an uncomfortable position and reduced to shuffling answers. When however the story of the events of the 26th and 28th of December is reached his evidence on perusal seems straightforward and convincing enough."

Russell, J. concurred adding that "In my opinion the evidence of the witness Devji cannot and does not outweigh that afforded by the facts and probabilities and documents in the case which have been so fully dealt with in the judgment just delivered."

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Devji's evidence was considered by the Appellate Court to be inconsistent with certain established facts, and not to have been corroborated in regard to matters on which if it was true corroboration would have been possible, and for these and other reasons they declined to accept it as proof of the fraud alleged.

On this appeal,

Upjohn, *K. C.* and *A. M. Dunne*, for the appellants, contended that the transaction in question was a fraud upon the appellant Company, to which the respondent's agent was a party, and it was submitted that the transaction was without any consideration, and was *ultra vires*, invalid, and void. The sum of Rs. 2,00,000 which purported to have been dealt with in the transaction was not required or enjoyed by, or for the purposes of the appellant Company, its only use or purpose was to cover a pretended loan or advance by the appellant Company to two insolvent companies, and it was carried out solely for the benefit of the respondent, and in fraud of the appellant. The judgment of the Trial Judge, it was submitted, was correct, and in the conflict of opinion on the evidence, and as to the credibility of the witnesses, the decision of the Trial Judge who had seen and heard the witnesses was to be preferred to that of the appellate Court, formed greatly on inference and conjecture, and should be followed. Reference was made to *Khoo Sit Hoh* v. *Lim Thean Tong*[1]; *The "Alice" and the "Princess Alice"*[2]; and *Montgomerie & Co., Limited* v. *Wallace-James*[3]. There was no rule to prevent the House of Lords from expressing their opinion on the evidence, even against concurrent judgments on facts.

[1] [1912] A. C. 323 at pp. 325, 332.

[2] (1868) L. R. 2 P. C. 245 at p. 252.

[3] [1904] A. C. 73 at p. 76.

Sir R. Finlay, K. C. and *Kenworthy Brown*, for the respondent, contended that the Appellate Court had rightly held that no fraud had been established against the respondent or his agent; and that even if the fraud alleged had been proved with regard to the deposit receipt of 28th December 1908 for Rs. 2,00,000, the appellant Company would not, owing to their conduct before the suit as disclosed by the evidence, have been entitled at the date of suit to avoid the transaction impeached. Admitting that the opinion of the Judge, who has heard the witnesses, was entitled to great weight, this was, it was submitted, not a case to which the decisions in the cases cited for the appellant were applicable. Reference was made to the Evidence Act, sections 157 and 159, as to corroboration by witness of former testimony, and refreshing memory of witness.

The appellant was not called upon to reply.

1915 February 25th:—The judgment of their Lordships was delivered by

SIR GEORGE FARWELL:—This is an appeal from a judgment and decree of the High Court of Bombay in its appellate jurisdiction reversing a judgment of the High Court in its original jurisdiction. The question at issue is one of fact. The respondent is a banker and money-lender against whom personally no imputation is made; his manager was one Dani. Dani was on intimate terms with one Dwarkadas, and Dwarkadas was for some years, until his death in August 1909, Agent and Managing Director of the appellant Company, and of two other Companies, the Tricumdas and the Lakhmidas; in 1908 the appellant Company was a flourishing and solvent Company, and the two other Companies were largely insolvent; and both were heavily indebted to the respondent for advances, to the amount of about 5½ lacs. The respondent was pressing

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Dwarkadas for further and better security in respect of these sums, and also of other monies advanced by the respondent to Dwarkadas personally; and Dani and Dwarkadas accordingly arranged to shift part of the indebtedness of the Tricumdas and Lakhmidas Companies on to the appellant Company. This arrangement was carried out by entries which can only be characterised as a barefaced swindle. Dani procured two cheques, one from the Tricumdas Company for Rs. 85,000, and one from the Lakhmidas Company for one lac and Rs. 15,000, and sent them over by his son to the office of the appellant Company, to be placed to their credit, but simultaneously Dwarkadas through his son Devji Damodhar telephoned to the cashier of that Company not to present the cheques, but to await further instructions; the two amounts were entered in the appellants' books to their credit and appear as :— "Rs. 85,000 cheque 1 in number drawn on the Bank of Bombay (bearing) No. 95500 S.S., and 1,15,000 cheque drawn on the Bank of Bombay bearing No. 7. 94950 S.S. No. 2." The two cheques were then destroyed by Dani's orders. It is difficult to suggest any object for this transaction of drawing and paying in cheques for the purpose of being entered with every circumstance of identification and reality, and then of immediate destruction without presentation, except fraud. The transaction was merely a paper one for the purpose of shifting the respondent's security from the two insolvent to the one solvent company. The Judge of first instance has heard the evidence, which depends on the credit to be attached to the two sons of Dwarkadas on the appellants' side, and to Dani on the respondent's; he has stated that he has seldom seen in the box "such serviceable, clear-headed and absolutely truthful witnesses" as the two sons or a more "thoroughly unscrupulous, untrustworthy, and untruthful man"

than Dani, and he finds that the transaction was a deliberate fraud on the appellants. The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appeal Court. But generally speaking it is undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the verdict of a Judge trying the case should not be lightly disregarded.

With all respect to the Appellate tribunal, their Lordships cannot accept their reading of the facts and inferences. They find no such contradictions or impossibilities in the evidence of the two witnesses whom the Trial Judge in this case has believed to justify their preferring the opinion of the Appellate Court formed on the written record to his deliberate conclusions after hearing it in Court. Again, several of the conclusions of fact adopted by the Appeal Court appear to their Lordships to be quite mistaken, *e.g.*, that Dani had no reason to fear and did not fear that the respondent would lose the money owing to him by the Tricumdas Company. It would serve no useful purpose to comment in detail on the judgment of the Appeal Court, but their Lord-

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ships feel bound to take exception to the Chief Justice's statement that the cross-examination of Dani, which convicted him of being party to a false and fraudulent balance sheet of the Tricumdas Company, was "not a very relevant point," and that Dani was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers." The observation might be of disastrous effect if accepted. Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case like the present where everything depends on the Judge's belief or disbelief in the witness's story, and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow.

Their Lordships will humbly advise His Majesty that the judgment of the Appeal Court be set aside and that of the High Court in its original jurisdiction be restored and that the respondent do pay the costs of this appeal.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Latteys & Hart.*

Appeal allowed.

J. V. W.