

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Delmege, Forsyth, and Company v. Wairamuttu Candyah, from the Supreme Court of the Island of Ceylon; delivered the 26th April 1907.

Present at the Hearing:

LORD MACNAGHTEN.

LORD ATKINSON.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The Appellants are merchants carrying on business in Colombo, under the firm of Delmege, Forsyth, and Co. On the 23rd January 1902 they entered into an agreement with the Respondent by which, for certain considerations, the latter was appointed, and undertook to act, as their broker.

Clause 6 of the agreement said that the Respondent—

“ In consideration of the premises doth hereby guarantee
“ the due payment to the said Delmege Forsyth and Company
“ at maturity of the whole of all sales effected by him on their
“ behalf also the payment of all moneys advanced by them
“ through his intervention and the due fulfilment and
“ completion of all contracts entered into by all person or
“ persons whomsoever with the said Delmege Forsyth and
“ Company through his intervention and of all sales effected
“ by him for and on their account and to make good and
“ pay to the said Delmege Forsyth and Company (forthwith
“ at the time such loss occurs) all loss or failure of payment
“ on such sales or on the non-fulfilment and completion of
“ such contracts and of all sales as aforesaid.”

The present action was commenced by the Respondent against the Appellants, on the 22nd November 1902, in the District Court of

Colombo, to recover moneys due to him for commission or brokerage. His claim was not disputed; but the Appellants set up, by way of reconvention, that an amount exceeding that due to the Respondent was recoverable by them from him, under Clause 6 of the agreement.

That claim so set up arose out of the following circumstances. Among the contracts entered into by the Appellants through the intervention of the Respondent, was one with Philip Silva, for the sale by the latter to them of certain quantities of plumbago. That contract is not before their Lordships, but no controversy has been raised as to its terms, nor does there seem to be any doubt as to the course of business followed in carrying out Silva's contract. The delivery was to be at his warehouse, and it was not to take place all at once, but was to be in parcels from time to time. When plumbago was ready for delivery, Simpson, the Appellants' export manager, went to the warehouse, inspected the plumbago, and, if satisfactory, passed it. It was then sized and packed into barrels by Silva under the supervision of the Appellants' servants. Sometimes on the same day, sometimes on the next day, Silva, in the presence of the Appellants' servants, weighed the barrels and so ascertained their price, and the weight of each was marked upon it. The barrels were then placed in carts and conveyed, at Silva's expense, to the Appellants' place of business or to the wharf.

As long as this course of business was honestly followed, all went well. But what actually happened is stated by the witness Perera, whose account is not impugned.

“ I am a Cangany employed by Philip de Silva. I was
“ examined in June 1902, in the Police Court, and again on
“ 30th June when Philip was present. The Defendant
“ Company bought plumbago from Philip Silva. Mr. Simpson
“ passed plumbago four or five times. The packing of the

“ plumbago was finished by 5.30 p.m. The tare is marked
 “ then. The next day the barrels are weighed. The full
 “ weight is marked on the barrel. At night the barrels were
 “ changed. Those packed were removed and others substituted.
 “ Those substituted were packed with rubbish in the middle and
 “ good plumbago at the two ends. Those were packed the day
 “ previous to the heaps being shown to the Company’s agents.
 “ I helped in doing it upon the orders of Philip Silva. They
 “ were substituted in place of barrels containing good
 “ plumbago also on Philip Silva’s orders. The Company’s
 “ men went away at 6 p.m. and came again the following day
 “ at 6 a.m. The barrels were weighed after their return in
 “ the morning. The barrels packed with rubbish were
 “ weighed and marked. Then they were removed in carts.
 “ I took a letter to Mr. Simpson divulging the fraud. 19
 “ barrels were removed one day. They were changed in the
 “ daytime. There were two clerks. One was talking to
 “ Philip Silva on the high road, the other was in another
 “ building when we effected the change.”

In consequence of this fraud of Silva’s, the Appellants sustained damages, the amount of which is not in controversy, and those damages form the subject of the claim in reconvention.

The District Judge who tried the case held that Silva had fulfilled his contract when the plumbago was passed and packed in barrels, and that his subsequent dishonesty had nothing to do with the contract. He accordingly disallowed the claim in reconvention. On appeal to the Supreme Court, the case came before Moncrieff and Wendt, JJ., who differed from the District Judge, and allowed the claim. The case then went on review before three Judges, Layard, C.J., and Wendt and Grenier, JJ. Wendt, J., adhered to the view he had already expressed. The other two learned Judges were of a contrary opinion, with the result that the claim in reconvention was disallowed. And that is the decision now appealed against.

In the Courts in Ceylon, there was some discussion as to the point at which the property in goods should be considered to have passed, in the case of a contract carried out as this contract purported to be, and as to what amounts

to delivery. These questions might be very material if the proceedings on Silva's part had been genuine and in good faith. But they were not so. Everything done by him, from before the packing of the plumbago into barrels, was a step taken in carrying out a fraudulent scheme, the object of which was to prevent the fulfilment of the contract in any real sense, to prevent the Appellants from having what they bargained for, and to palm off upon them barrels of rubbish in place of barrels of plumbago. Their Lordships are unable to accept the view that such a proceeding is a due fulfilment and completion of Silva's contract.

Their Lordships will humbly advise His Majesty that the Order and Judgment of the Supreme Court in Review should be discharged with costs, and that the first Judgment of the Supreme Court should be restored. The Respondent will pay the costs of this Appeal.
