Privy Council Appeal No. 149 *of* 1923.

Diwan Chand-Kirpa Ram and Company - - - - - *Appellants*

v.

Weld and Company - - - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL, 1925.

Present at the Hearing:

LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD BLANESBURGH.]

The appellants in this case are general merchants carrying on business at Kasauli, and the respondents are cotton brokers and merchants at Liverpool with a branch office at Bombay.

The business transactions between the two firms, carried out by the respondents through their Bombay house, commenced in the month of September, 1915, and had the appearance, at all events, of a succession of contracts for the purchase or sale of cotton for future delivery made by the respondents on the instructions and for the account of the appellants. These purchases and sales on the appellants' side look, it must be confessed, very like gambling transactions, not intended to be completed, and never, in fact, completed either by the taking or the making or delivery of any cotton. Genuine contracts by the respondents were apparently in no way necessary to secure for the appellants

all that they desired from their enterprise, and it was at one stage of the case strongly contended by them—it was, indeed, so found by the Trial Judge—that a set of contracts under discussion in these proceedings—the three contracts, that is to say, which their Lordships will later on refer to as the disputed contracts—were not shown by the respondents to have been entered into with any reference at all to the appellants.

It has, however, all through been the case of the respondents, and their Lordships for the purposes of their judgment freely accept it, that the transactions in cotton futures between the appellants and themselves were in every case translated into real contracts of purchase or of sale involving them in serious liabilities to third parties. All of these contracts had to be made by the respondents in their own name ; upon each of them they became personally liable either as buyers or sellers ; their relation to the appellants under them was the relation of brokers only, their expected profit being derived exclusively from the commission charged by them on the contracts entered into for behoof of their clients.

On the occasion of and in relation to every agreement to purchase a future in cotton made by the respondents at the appellants' instance, a memorandum of the transaction was presented by the respondents to the appellants for signature. That memorandum where the custom to purchase was on New York or Liverpool contained the clause following or its equivalent :—

> " We have deposited with you the necessary deposit at the rate of Rs. 1,500 per 100 bales and we agree to maintain such deposit and to forthwith deposit with you in Bombay such further sum of money as you may from time to time require as further margin to meet any difference in price which may occur in the event of the market rate in Liverpool declining, and we agree that the amount of such further margin from time to time required by you shall be in your absolute discretion. Interest at 5 per cent. per annum will be credited to us on the amount of the margin or any further margin. If we neglect or fail to pay you in Bombay any sum of money required by you as aforesaid after demand by letter or telegram addressed to our usual or last known residence or place of business it shall be lawful for you or your Liverpool firm without any notice to us to sell the cotton in respect of which such demand shall have been made on our account and risk and notwithstanding any objections or instructions from us to the contrary."

The clause of the memorandum presented to the appellants by the respondents on the occasion of an agreement for the sale of a future by them was in identical terms, with the substitution of the word " advancing " for the word " declining," and of the words " buy back " for the word " sale " where the words " declining " and " sale " respectively occur.

The main question now remaining between the parties is whether the respondents, relying upon the above clause in each memorandum were, upon the appellants' alleged default in providing further cover demanded by the respondents, justified

without the appellants' authority in closing on the 11th December, 1916, and before their due dates, two forward contracts in cotton, one in New York and the other in Liverpool, then open on account of the appellants.

The facts, many of them the subject of acute controversy in both Courts below, are no longer in dispute. They can be compendiously stated so far as they are now material.

On the 27th November, 1916, the respondents had open on the appellants' account two contracts in futures. The first of these was a contract of the 17th November, 1916, for the sale on the New York Exchange of 100 bales middling American cotton at 20·80 cents per lb., delivery March, 1917; and the second was a contract of the 22nd November, 1916, for the purchase in Liverpool of 200 bales Liverpool Americans at 12·30 cents per lb., delivery March/April, 1917. On the 27th November, 1916, no other contracts were open between the parties.

During that week the cotton market was apparently in a disturbed state, and the appellants, bent on speculation, seem to have oscillated from day to day between buying and selling. On the 26th November they wired the respondents to sell 200 bales Bengals, but on receipt of advice from the respondents recommending a purchase, the appellants on the next day, the 27th, cancelled the selling order and instructed the respondents, instead of a sale, to purchase 100 Akola, 100 Broach and 200 Bengals, 400 bales in all. This instruction to buy not being quite clear to the respondents, it was, at their request, confirmed on the 28th November by a further telegram from the appellants, which in turn, on the morning of the 29th November, after receipt from the respondents of advice intimating a considerable fall in prices as compared with those of the previous day, was finally countermanded by a wire from the appellants instructing the respondents to wait to execute the order and to wire opinion. Notwithstanding this instruction, however, and, as is not now contested, after it had been received, the respondents made the purchases directed by the appellants' wire of the 28th, and they notified the appellants that they had made them by the following telegram despatched from Bombay on the same afternoon :—

> Bought one hundred Broach [at] Rs. 448; one hundred Akola at Rs. 420; two hundred Bengals at Rs. 349·8.

These are the three disputed contracts above referred to. The appellants at once repudiated the authority of the respondents to make them on their behalf; they said that a reference to the telegrams with other evidence showed that the contracts, if made at all by the respondents on their account, had been entered into after the appellants' instruction to delay execution had been received. This position the respondents vigorously contested. They asserted and continued to assert that the appellants' telegram of the 29th was not received until after

the order contained in that of the 28th had been executed; they insisted and persisted that the appellants were bound by the three contracts of purchase, and on the 9th December they wired the appellants as follows:

> "Bazar rumours ninety-one for New York, thirty-five Liverpool down. We require Rs. 5,000 against your open contracts. Unless we receive this money on Monday we cannot carry contracts on such fluctuating markets. Reply immediately."

The open contracts referred to in that telegram are specified in a further telegram of the respondents of the 10th December. They were the three disputed contracts of purchase of the 29th November, the sale contract of the 17th November, and the purchase contract of the 22nd November—sometimes in the proceedings referred to as the New York and Liverpool straddle, which were then admittedly open.

With the demand for cover by the respondents, the appellants refused to comply. Their answer to it was that for the two last contracts the respondents had sufficient margin, and for the others the appellants held no responsibility. To this on the same day, the 11th December, the respondents replied by telegram that the appellants were mistaken; that the respondents held them responsible; that all transactions were stopped because they had not responded to the margin call of Rs. 5,000, and the telegram continued as follows:—

> "Have closed out all your business: 100 Broach 392: 100 Akola 362: 200 Bengal 288: also cabled Liverpool to buy 100 March, New York, and sell 200 March/April. Statements will follow."

There had been, it will be noticed, a serious fall in the prices agreed to be paid under the disputed contracts, and the necessity, or at all events the propriety, of demanding further cover if these were, in fact, the contracts of the appellants can hardly be questioned. And it was, as will appear, only on this footing that the respondents at the trial sought to justify their demand. They admitted then that if, on the 11th December, the only contracts open by which the appellants were bound were the so-called Liverpool straddle, the demand for further cover could not be maintained. But they were permitted to withdraw that admission in the High Court, which adopted the view then presented that even on that footing the respondents' demand for cover was justified. With this aspect of the case, therefore, their Lordships must deal on this appeal, and it is convenient now to state some further facts.

The respondents' course of business in the matter of additional cover was described at the trial by Mr. Vaz, their head clerk at Bombay. The ledger account of each client in the respondents' books is, he explained, a money account which shows also the clients' profit or loss on closed transactions. Transactions still open are not recorded in the ledger account. These appear in what apparently is called a margin money account. There they are calculated at the current market, and show the profit or loss of

the client in account with the respondents. The collation of the results of the two accounts enables the respondents to see at a glance the amount standing with them to the credit or debit of the client—the governing factor in the decision whether further cover shall or shall not be demanded.

Now it is admitted that upon the 11th December, 1916, the respondents held at the credit of the appellants the sum of Rs. 13,496-6-11 arrived at in this way. Of the two contracts with which we are now alone concerned one, as will have been seen, was for a future purchase of 200 bales; the other was for a future sale of 100. The market was falling; it was accordingly against the first contract only that the respondents, if at all, required protection, while the fall producing the loss on the first contract added approximately to the profit per bale accruing on the second. The result was that the respondents were substantially, although not precisely, at risk only on balance of 100 bales on the first contract over the second; and against that they had a fund in hand of Rs. 13,496-6-11. In this connection it will be recalled that under the memoranda, Rs. 1,500 per 100 bales was the normal deposit, and the actual sufficiency of what they held is further shown by the fact that when these two contracts were closed by the respondents on the 11th of December there still remained in their hands to the credit of the appellants approximately Rs. 10,850.

These are the facts with reference to which this question of further cover will now have to be determined. It may, however, be convenient by way of contrast to indicate what the position of the respondents would have been if the disputed contracts when demand for cover was made, had been, as they were assuming, binding on the appellants. The closing of these contracts, added to those of the New York and Liverpool straddle, would in that event have left the appellants in debit to the respondents in the sum of approximately Rs. 1,280—of the sum for which, as will be seen hereafter, the respondents actually counterclaimed in these proceedings.

Returning to the closing of the two earlier contracts as the only closing now relevant, the effect was that as a result there was shown, on the 100-bale contract for sale, a profit to the appellants of Rs. 2,785-9-6, and on 200-bale purchase contract a loss of Rs. 5,488-2-9. By the date when the appellants commenced the present suit, the difference between the contract price and the market price as to the first of the two contracts had increased to Rs. 7,269 in favour of the appellants.

The suit was commenced by the appellants in the Court of the Senior Subordinate Judge of Ambala on the 6th January, 1917. In it the plaintiffs claimed Rs. 20,998-1-11 made up as follows:—

Rs. 13,496 6-11 ..	Balance in favour of the appellants on the 8th December, 1916, as above stated.

Rs. 7,269..	..	Damages calculated on the basis of difference between the contract price and the market price of the 100 bales alleged to have been wrongfully closed on 11th December, 1916.
Rs. 232-11	..	Interest at the rate of 9 per cent. per annum to date of suit.

The main question litigated in the Trial Court was whether the disputed contracts were made on behalf of the appellants by the respondents as brokers, and whether these contracts, if they were in fact so made, were made with the authority of the appellants. The learned Judge, in his judgment, found it not to be proved that any purchases at all were made by the respondents for the appellants on the 29th November, 1916, and he also found that even if the alleged purchases of that day were made for the appellants they were made after the order for them had been duly cancelled. He records in his judgment the admission of the respondents already alluded to, that if the disputed purchases were made after cancellation of the order therefor, they were not justified in closing the " New York/Liverpool straddle."

> " It is admitted," the learned Judge says in his judgment," that in view of the above findings the defendants were not justified in closing the contracts on the 11th December, 1916, as they had sufficient margin money and the amount of the damages arising from this closing up and the rates of interest are also not disputed. I accordingly grant a decree to the plaintiffs for Rs. 20,998-1-11 with costs against the defendants."

The defendants had counterclaimed for Rs. 1,283-1-3, the exact amount which, as above appears, was due to them if the appellants had been bound by the disputed contracts. That counterclaim was dismissed. It will be noted that the learned Judge, while including in his judgment a sum in respect of interest up to the date of suit, omitted, as it is said by inadvertence, to give, although it was claimed, either interest at 9 per cent. per annum to the date of judgment or interest at the rate of 6 per cent. per annum on the judgment debt until payment.

From that decree both the appellants and respondents appealed to the High Court at Lahore. The respondents' appeal, so far as the notice thereof was concerned, was confined to the matters which they had argued and on which they had failed in the Court below; the present appellants' cross appeal was with reference to the omissions of interest from the decree of the Subordinate Judge.

The learned Judges of the High Court confirmed the second finding of the Subordinate Judge as to the three disputed contracts. They held that the respondents effected these contracts after receipt by them of the appellants' telegram cancelling their instructions to purchase, and that consequently the appellants were not responsible therefor.

And there, if the admission made by the respondents in the Court below had been adhered to, the case would have ended, for

the respondents no longer contest these concurrent findings of both Courts. But in circumstances which are not fully explained the learned Judges of the High Court allowed the respondents to withdraw their former admission.

> "There is no admission now," they say in their judgment, "that if the plaintiffs' telegram of revocation reached the defendants before the purchases of the 29th November were made, the defendants were not justified in closing the New York and Liverpool contracts on the 11th December,"

and they proceed to deal with the case on that footing, deciding in the result that even if these were the only contracts open on that date, the respondents were empowered to demand further cover of Rs. 5,000 in respect of them and to close the contracts upon failure by the appellants to provide it. Accordingly the learned Judges treated both contracts as properly closed, varied the decree of the Subordinate Judge by making it one for Rs. 10,857-4-10 only, and they dismissed the present appellants' appeal as to interest.

Their Lordships, while not regretting that the contention referred to was treated in the High Court as being still open to the respondents, must add that it does seem to them that an indulgence which permitted them to raise it after it had been so deliberately abandoned at the trial was extended to them too much as a matter of course. It is only in special circumstances that a consent which, as in this case, formed the foundation of the judgment appealed from is in the Appeal Court to be treated open to withdrawal.

From the decree of the High Court the present appeal is brought, and the principal question argued before their Lordships has been whether, on the footing that the New York and Liverpool contracts were alone open, the decision of the High Court that the respondents were entitled to demand further cover of Rs. 5,000 and close the contracts on failure by the appellants to provide it can be supported.

Their Lordships would at once observe that the decision of the High Court on this point is made of less weight by the circumstance that it is apparently based upon a misconception of fact. The learned Judges there proceed upon the statement which they make quite definitely in their judgment that the demand for cover was made by the respondents as "additional margin money against the two contracts mentioned in the plaint." Such was not the fact, as their Lordships have been at pains to show. The demand was made with reference, and only with reference, to the five alleged outstanding contracts as to which the demand for further cover was so reasonable that its propriety could not have been questioned. As applied to the two contracts only, however, the demand was, as has been shown, extravagant, and can only be justified, if at all, on the ground that the discretion of the respondents in the matter being "absolute" its exercise in the

absence of fraud is not open to review. But even this view will not avail the respondents if in fact their discretion, however absolute, was in relation to these two contracts never exercised at all. And it was not. The only discretion they did exercise was that which they treated themselves as possessing with reference to their commitments on the five contracts. As applied to two of these only, their Lordships, on the figures which they have detailed, cannot doubt that, the *bona fides* of the respondents not being questioned and their intelligence as business men being assumed, no demand for cover ever would have presented itself to their minds as being even possible.

The respondents' counsel faced with this were, their Lordships felt, not far from suggesting that an absolute discretion, like that of the respondents in this matter, was the equivalent of a right to make a purely arbitrary demand. It is not so. A discretion although absolute, it is none the less a discretion to be exercised with reference to the true position and with perhaps even a greater sense of responsibility in that it is within limits final. On the true position of the parties as it existed on the 11th December, 1916, their Lordships are satisfied that there was never by the respondents any exercise of discretion at all. The demand for further cover was accordingly not properly made, and the subsequent closing by the respondents of the two open contracts cannot be justified.

It was, however, further contended by the respondents that in any case the judgment of the learned Subordinate Judge was erroneous in this that he therein treated the so-called New York and Liverpool straddle as two transactions carried out by two separate contracts, whereas he ought to have regarded the transaction as one, the second contract being merely a hedge against the liabilities subsisting under the first. Their Lordships cannot agree. The phrase employed to describe the two contracts is picturesque and it may well have, as indeed has been shown, a certain business significance. But their Lordships cannot doubt that these contracts, effected in different markets for different quantities of cotton, with different delivery dates on separate instructions and evidenced by separate memoranda, are in law for all purposes distinct the one from the other, and the liabilities of the respondents to the appellants in respect of each are separate. The respondents were at fault in cancelling either contract. It is fortunate for them that it is in respect of one cancellation only that any loss has been sustained by the appellants. The fact that as the result of the respondents' wrongful act a benefit may have accrued to the appellants in connection with the other is a fact for which no credit can be claimed by the respondents. Upon this point the case of *Lacey* v. *Hill*, 8 Ch. Apps. 921, may, their Lordships think, be usefully referred to. This contention of the respondents accordingly fails.

It remains only to deal with the appellants' claim that the order of the learned Subordinate Judge should have included a

sum in respect of interest up to date of judgment and should as a judgment have been expressed to carry interest at the rate of 6 per cent. per annum.

Their Lordships think it more than likely that both items were excluded from the learned Judge's order by an oversight. He included in the decretal amount, as has been shown, interest at 9 per cent. up to the date of suit, and in his judgment he expressed approval of the rate charged. Rightly or wrongly, too, he took a stronger view of the respondents' evidence than did the High Court, and their Lordships have little doubt that if the point had been present to his mind, the learned Judge would in both matters have adopted the general rule and allowed interest until payment. Their Lordships, however, are not merely on conjecture prepared to direct any variation of the decree in respect of interest up to its date. Such interest is not as of course. They think, however, that in all the circumstances it would only be right to direct a variation of the decree in respect of interest subsequent thereto.

On the whole case accordingly their Lordships are of opinion that the decree of the High Court should be discharged and the decree of the learned Subordinate Judge restored with the variation that the decretal amount carry interest at the rate of 6 per cent. per annum until payment, and their Lordships will humbly advise His Majesty accordingly.

The respondents must pay to the appellants their costs in the High Court and of this appeal.

In the Privy Council.

DIWAN CHAND-KIRPA RAM AND COMPANY

v.

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DELIVERED BY LORD BLANESBURGH.

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