

Kaikhushroo Rustomji Wallace - - - - - *Appellant*

v.

The Bombay Company, Limited - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 28TH JUNE, 1927.

Present at the Hearing :

VISCOUNT SUMNER.

LORD SHAW.

LORD DARLING.

[*Delivered by* VISCOUNT SUMNER.]

This action was brought by the appellant, Mr. Wallace, to recover a balance of commission, alleged to be due to him under an agreement dated the 6th February, 1920, between himself and the respondents, his former employers. Ultimately the question is one of construction, and the words which are chiefly material are these :—

1918–1919 *Accounts*.—You will receive a sum equivalent to 5 per cent. of the nett profits (as shown in the books) of the Bombay Branch of the Bombay Company, Limited, as accruing from the sales of all goods for which you were salesman, whether on purchase or joint account.

In addition to this . . . you will be credited with a further sum equivalent to 5 per cent. of the nett profits as shown in the books of the Bombay Branch . . . as having accrued from the sale of all goods sold on joint account and for which you were salesman during the years 1916–1917, 1917–1918, and 1918–1919.

1919–1920 *Accounts*.—As regards other goods sold by you prior to the 7th February, 1920, the results of which have not been included in our closed accounts up to 31st July, 1919, you will be given remuneration on the same basis detailed above. The total sum due to you will be paid as soon as the nett profit is ascertained, and you will be asked to give us a final receipt in full settlement of all claims whatever against us.

The circumstances under which the agreement was entered into are these. After twenty-six years in their service as a salesman, Mr. Wallace desired to end his connexion with the respondents, certain fresh terms, which he suggested, not proving acceptable. All that remained was to agree the method and ascertain the figures, according to which his outstanding commissions should be paid to him. Their course of business was this. They purchased piece goods in England at prices reckoned in pounds sterling and sold them through their salesmen to dealers in or near Bombay at prices which were reckoned in pounds sterling also. Long credit was given to these buyers and accordingly the respondents often lay out of their money for a considerable time. To pay for the goods in England and for other purposes they remitted funds generally to their English correspondents, who paid the English sellers for the goods, and they made these remittances from time to time as was convenient, by means of sterling drafts on England procured in Bombay at the current rate of exchange. It was not necessary that specific remittances should be made for specific parcels of goods or that the date of the remittance and the due date of the invoices for the goods should coincide, and they found it sufficient to treat payments in their own books as having been made at the average rate of exchange for the customary period within which they fell.

The respondents are also what is called a rupee company. Their financial arrangements are computed in Indian currency, and in particular their profit and loss accounts and balance sheets are made upon a rupee basis. Owing to the length of time intervening between payment for the goods imported and receipt of the sale proceeds from the Indian buyers, they had to show their financial results for office purposes and for presentation to their shareholders during this interval by converting the apparent sterling proceeds into Indian currency at a rate of exchange which was, in the first instance, provisional. An average rate was again made use of, not necessarily over a period corresponding to that used for converting remittances to Europe, nor even always a uniform period. For their own purposes this closed the transactions, and the rupee profit so appearing was treated as realised and final, subject only to reduction in the event of bad debts. These seem to have been of rare occurrence before 1919, but such as there were could be dealt with in the subsequent accounts as occasion might require. So long as the rate of exchange remained fairly stable, questions as to the best method of calculating it did not arise.

It is not contended that the respondents' books have not been carefully and correctly kept or that any change in their system has been adopted for the purpose of the accounts, which they submitted in the action. Down to the date of the dispute Mr. Wallace accepted and still accepts payments, which were made, in fact, according to the method which they still employ.

This does not prejudice him, for it may not previously have been worth his while to raise any question, nor was he shown to have actually known how the books were kept, but the fact is worth recording as it removes any appearance of inconsistency or arbitrariness, which might otherwise arise on the respondents' contentions.

As a purely academic matter the question is one of comparing two figures. Mr. Wallace's commission depends on the Bombay Company's profit. That profit is nett, which, as the parties agree, means that in ascertaining the profit the result of the transaction must be looked to, but that the expenses of the business in connexion with it need not. *Prima facie*, in respect of each sale effected by the salesman, the sum received for the goods sold, less the sum paid for them, is the profit, and these sums have to be compared in the same currency.

Mr. Wallace, however, conceded further that this pure theory must be modified in practice. He himself is paid in rupees, and here, at any rate, exchange enters into the transaction. He accepts the respondents' method of ascertaining the rate of exchange, at which the original cost is converted into rupees, namely, by an average rate, but with the method, by which the company shows its internal financial position, or the figures, on which it invites its shareholders to approve its profit and loss account, he contends that he has nothing to do. He was a servant, not a shareholder. His concern was only with the ultimate realised profit. Again, with the operations of the respondents' exchange department he contends that he has no concern, for exchange should be regarded as a wholly separate business. He was only a piece goods salesman, an employee, who earned a commission, not a co-adventurer with the respondents, interested in the outcome of the sales as such. Hence a bad debt affects him only so far as it prevents the ultimate realisation of a profit. No profit, no commission, was his bargain, but he had no agreement as to sharing losses in any form.

The validity of these objections, of course, depends on the extent, to which the theoretic position of a commission salesman is in this case qualified by the agreement sued on, according to its true construction. Two preliminary observations may be permissible; firstly, the object of the agreement is to put an end to existing business disputes by a short and even summary manner of deciding them; secondly, the mode in which this end is to be attained is by making the business books of one party conclusive evidence against the other for certain purposes, instead of being evidence merely against the Bombay Company and then only if the appellant should find it worth his while to put them in.

The present dispute relates only to the commission due for the period beginning on the 1st August, 1919, which was the commencement of the respondents' financial year, and ending with the 7th February, 1920, the date of the agreement. In 1916 and 1917

exchange was practically steady. It then began to rise, and in two years had risen, from 1s. 4 $\frac{9}{32}$ d. at the 1st August, 1917, to 1s. 8 $\frac{1}{32}$ d. at the 1st August 1919. By February and March, 1920, it was as high as 2s. 7d. ; by July it had fallen to 1s. 10d., and in 1921 it was as low as 1s. 3 $\frac{13}{32}$ d. Such fluctuations inevitably produced difficult conditions for dealers, both importers and local merchants. One result, which can hardly have been unforeseen by experienced people in the trade in February, 1920, was that local buyers became slower in settling their accounts, and in many instances ultimately defaulted. Another was that, in the meantime, the method of converting sterling into rupee obligations or vice versa might prove very important to persons, whose rights and liabilities were still unsettled. How, then, does the agreement of February, 1920, deal with these matters ?

As the amount of Mr. Wallace's commission is a matter of percentage, the real point is the profits, on which that percentage is to be taken. According to the words of the agreement these profits are : (1) profits of the Bombay Branch, (2) accruing from sales by Mr. Wallace, (3) as shown in the respondents' books, (4) nett. "The books" accordingly become to some extent the arbiters of his rights. What are "the books" ? A firm's books come into existence and are kept not for the purposes of a mere statistical record of transactions and payments or of prices and rates. They are essentially a statement in figures of the firm's business as a whole, so shaped as to bring out the precise results of all transactions in rights and obligations and in profits and losses and the principles, on which they set off one set of figures against another and attribute and distribute the results, are as much part of the books as the figures themselves, though no written statement of them is anywhere set out. A plaintiff, who accepts the defendants' books as deciding his rights to some extent, accepts them to that extent (unless he guards himself by apt words) as statements of the right mode of distributing the results of the recorded transactions, and not as a mere repository of figures like a calendar or a price list. The main object of the bookkeeping was to determine and show the trading position and results of the company, though a minor and incidental object served was to show what it owed Mr. Wallace for commission. That matter always lagged behind the conclusion of his sales, and in 1920 was likely to be more behindhand than ever. Having left the respondents' employment, he might presumably have even less opportunity than before of ascertaining for himself how these transactions were working out, but as these results would be shown in the books, as and when the buyers met their obligations, from these entries his percentage could, and in ordinary course would, be transferred to the credit of his account in the ledger. Their Lordships do not think that on the terms of this agreement the books can be divorced from the system of book-keeping of which they are the expression, or that nothing is intended

to be decisive except figures picked out here and there from particular folios. The thing on which the percentage is to be reckoned is the profit of the branch as shown, and in showing a profit the mode of getting at it is as relevant as the final figure. The profit is the profit of the Bombay branch, not of some selected department of that branch, and it is the company's profit. Unless some agreement with their salesman ties the respondents' hands, the calculation of it is in the first instance their affair.

Mr. Wallace's ledger account in the books showed nothing with regard to the period in dispute, for it had not been posted up, and it was argued that he could not be bound by what the books showed, where they showed nothing, but in such a case only by a calculation from the figures shown, made in accordance with a method which the Court would fix as correct. Their Lordships cannot adopt this distinction. The circumstance that the appellant's ledger account had not been made up cannot alter the rights of the parties. It might have been due to accident. It was, in fact, due to the disputes which had arisen between the parties and everything was carried to a suspense account only. To lay stress on the word "shown" as meaning "now shown" or "shown, when the respondents' servants have been told to show them," is to defeat the efficacy of the contract. The one reading would deprive Mr. Wallace of commission on any sales, on which at the date of the agreement no profit had yet accrued, for the object of the agreement was to settle all transactions for the period in question and not merely such of them as had then got into the books in a completed form. The other would enable the respondents to bring his claim to a standstill by ordering the proper entries to be omitted. Profits "shown" can only mean profits, which from time to time are, or in the ordinary course of business will be, shown. Anything else defeats the contract as an agreement of compromise, and, on the other hand, the agreement refers to profits "shown as accruing" in the books, not to profits which the books do not and never will show as accruing, though by a combination of selected book entries and of argument upon them they may be represented as profits, which ought to have been shown as accruing.

In the view which their Lordships have thus taken of the meaning of the agreement, they can now proceed to deal with the appellant's three objections to the accounts as shown in the respondents' books.

(1) When customers who have "fixed the exchange" with the exchange department subsequently default, the respondents in exercise of their right to reduce apparent profits to nett profits, deduct from the amount credited on sales account the amount of rupees, into which the sterling debt had been subsequently converted when the exchange was "fixed," instead of the corresponding amount of rupees at the date of that credit.

(2) When the customers have met their obligations and have paid for the goods purchased, all that the respondents enter in ascertaining their nett profits is the sterling selling price converted into rupees at the average exchange over a period anterior to the actual date of payment. Thus, when the exchange has been "fixed" after the end of the period over which the rate of exchange was averaged, the respondents have, in fact, received more rupees than the amount of rupees, which they bring in as the basis of their profit, and on which the appellant's commission is reckoned. When this higher number of rupees has been paid, the respondents say nothing about it; when it is a bad debt they bring it in as a deduction in full, and Mr. Wallace is disadvantaged both ways.

(3) In addition to their separate importations of piece goods, the respondents have an arrangement with a Manchester firm, under which they import piece goods on joint account. The Indian customers being known to them but not to the Manchester firm, they have agreed with that firm, in return for a half per cent. commission, to guarantee the payment for the goods. Thus when they render account sales they credit themselves with this commission and with one-half of the profit appearing on the sale contracts, and so the matter is closed. All bad debts are thereafter solely their own affair. When they come to reckon their nett profits, they charge the account with all bad debts, but with only half the realised profits plus their *del credere* commission, and account to Mr. Wallace for his commission on the balance. His objection is that as against him only half of the bad debts should be charged. Though he negotiated the sales, he was not informed of the *del credere* arrangement, and, as he does not receive any percentage on the Manchester firm's share of the profits, he should not suffer an abatement of his percentage on the respondents' share in consequence of it.

To this there is an answer, which is separate from the general answer applicable to all three objections. It was the view of both Courts below, with which their Lordships agree, that the half per cent. *del credere* arrangement was a part of the joint account arrangement and ought not to be treated at the will of Mr. Wallace as a separate trading transaction. It was the very natural price asked for the respondents' admission to the joint account business at all. In the result their nett profits on the whole transaction were a moiety of the profit appearing on the selling contracts, plus a half per cent., and minus all bad debts, if any. It is on this basis that they have accounted so far as the joint account business is specially concerned.

The general answer is the same for all three objections. The system adopted by the respondents is the system by which the appellant has agreed to be bound. In the abstract Mr. Wallace's contention is this. He sells in sterling goods bought in sterling, and, subject to realisation, the profit is a sterling profit

measured by the difference between the buying cost and the selling price, and the commission is a sterling percentage payable when that profit is realised. Rupee exchange has nothing to do with the transaction. The employers can take payment in any currency and at any rate they like ; the only material question is whether the customer has performed his contract. The employers have to pay his commission in sterling, however inconvenient he may find it. As for bad debts, so far as he is concerned, they are simply sales negotiated, but resulting in no commission-bearing profit. They have, therefore, to be eliminated from the list of his transactions. He has lost his labour, but he has nothing to do with his employers' loss of the price of their goods, nor can this be used to diminish profits successfully earned on other transactions, so as to deprive him of his percentage thereupon. In the abstract Mr. Wallace's contention may be right.

The difference between the abstract position and that which, in the concrete, Mr. Wallace accepts for the purpose of this appeal serves to emphasise the fact that his actual employment was necessarily relative to his employers' way of doing business and had to conform to it. If he had insisted on abstract terms, he would probably not have been employed at all. As it is, he admits a conversion into rupees, so as to get payment in rupees ; he admits an aggregation of the sale transactions of the year with the consequent averaging of the rate of exchange at which the sterling cost is converted into rupees, and he admits the consequent interpretation of the word " nett " as authorising a deduction of bad debts in their entirety. He argues that the operations of the exchange department concern him, when the buyers perform their bargains, and entitle him to his percentage on the enhanced rupee receipt as " fixed " on a falling rupee exchange, while they do not concern him at all when the buyers' default involves the deduction of bad debts from the profits assumed for the purposes of the company's own finances. All this merely shows how essentially his rights depended, and depend, on express bargain ; on his written agreement so long as he was at work ; on the agreement sued on when he came to compromise a dispute, which would have involved a challenge of the basis, on which the company regulated the whole of its affairs. The witnesses did not contest that the company's system was reasonable and sound for its own purposes, and an agreement to be bound by the books of the business naturally did not provide a special and different system for the relatively small part of it, which affected Mr. Wallace.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

KAIKHUSHROO RUSTOMJI WALLACE

v.

THE BOMBAY COMPANY, LIMITED.

DELIVERED BY VISCOUNT SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2
1927.