

Privy Council Appeal No. 57 of 1931.

Walter Smith, since deceased (now represented by John Bamford
Smith and another) - - - - - *Appellants*

v.

Ahmed Abdeenbhoy Peerbhoy - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE, 1935.

Present at the Hearing:

LORD ATKIN.
SIR JOHN WALLIS.
SIR SHADI LAL.

[*Delivered by LORD ATKIN.*]

This is an appeal from a judgment of the High Court at Bombay who reversed a decision of Kemp J. in favour of the plaintiffs, the appellants, at a trial on the original side. The claim was for a balance of account. The plaintiffs, under the firm name of Clarke and Smith, carried on business in the city of London as produce merchants, doing amongst other activities a consignment business. The defendant carries on business in Bombay as a dealer in hides and skins and other produce, doing also a commission business. The parties came into business relations during the war in 1916 on an introduction of the defendant to the plaintiffs by Bombay correspondents of theirs. No formal agreement was drawn up between the parties: and the terms of business are to be derived from the letters and accounts passing in course of business. The defendant consigned goods to the plaintiffs, and the general terms are expressed in the plaintiffs' first letter to the defendant of 29th June, 1916. "Our commission is 2 per cent. and we are prepared to accept your three months sight draft for 75 per cent. of the value of the produce you may contemplate consigning to our care." The first consignment appears to have been 10 bales of sheep and goat skins tanned per s.s. "Kashmir". The defendant duly advised the consignment on 21st August, 1916, drawing for 75 per cent. of the value "as per your instructions in your first letter to me". "At the time of wiring sale prices you will kindly use the number written against the code word in the invoices. It is hardly necessary for me to add that henceforth you will direct all letters and

cables to my above address where I have put up an office. . . ." Within a couple of months the defendant began to consign goods on behalf of named persons whom he styled his constituents. The question that arises in this case is whether the defendant is personally liable for losses made on these "constituent" consignments. No express bargain was made and the contractual position has again to be determined from the course of business. The first introduction of a constituent is to be found in a letter dated 27th November, 1916, which is as follows:—

Besides confirming my last letter I have to advise you about my shipment of 24 bales tanned sheep and goat skins per s.s. "Caledonia" about which you must have learnt from the wire to you for war risk.

This shipment of 24 bales skins per s.s. "Caledonia" comprises as follows:—

9 bales tanned sheep skins: Draft drawn for £1,200.

1 bale tanned sheep skins: Draft drawn for £75.

13 bales tanned sheep skins: Draft drawn for £847.

1 bale tanned goat skins: Draft drawn for £63.

Hence you will find that against 24 bales of skins I have drawn £2,275 only. Now the first two lots out of this parcel are my own, i.e., 10 bales sheep skins, and I hope you will take care of the same as you have done of my previous parcels to you. The remaining two lots, i.e., 13 bales sheep skins and 1 bale goat skins tanned, out of this parcel, are my constituents, Mr. V. M. Abdul Rehman and I hope you will kindly pay equal attention to the same. I have allowed my said constituent, Mr. V. M. Abdul Rehman, to draw against his 14 bales skins £910 only, which is very considerably below the value of the goods, for to be on the safe side. I have accepted his draft for £910 and I hope you will kindly accept the same and oblige me. I have to request you to be so good as to charge 3 per cent. commission and return to me 1 per cent. out of the same at the time of sending account sales of these 14 B/S of sheep and goat skins belonging to my constituent, Mr. V. M. Abdul Rehman.

It was accompanied by an invoice, Bombay, 26th November, 1916, "Invoice No. 17. Code word Rumboses (22). Invoice of 13 bales of tanned sheep skins shipped per s.s. 'Caledonia' from Bombay to London on account and risk of the undersigned of Bombay and consigned for sale to Messrs. Clarke and Smith of London, E.C., and for returns through A. A. Peerbhoy, Eqr., Bombay." Then follow marks, description, weight and value and the signature V. M. Abdul Rehman. There followed the introduction of a number of constituents about 12 in all. The form of invoice above is a specimen invoice. Address or description of the business of the "constituent" was never given: at the trial no evidence was given by the defendant or any constituent and no books or documents were disclosed by the defendant relating to any accounts or communications either with the constituents or at all. It appears *prima facie* improbable that the plaintiffs would have undertaken consignment business of the kind in question on the sole credit of persons of whom they knew nothing but the names: and it appears to their Lordships that they did nothing of the kind. The business was conducted in the usual way. The plaintiffs accepted the drafts: they sold the goods and when the sales were completed they prepared account sales

for each consignment crediting the proceeds and debiting charges: and then a statement of account for each consignment crediting the nett proceeds of the account sales and debiting the draft together with interest to date. As was proper where they had been informed that the goods were not the property of the defendant they prepared the account sales and the corresponding statement of account in the name of the constituent and despatched them in that form to the defendant. But as far as settlements were concerned they kept but one account with the defendant which was rendered to him half yearly. In connection with each constituent as his transaction was closed and a statement of account was prepared if the balance was in favour of the constituent, they drew a sight draft on the defendant in favour of the constituent, and credited the defendant's account: if the balance was against the constituent they drew a draft on the constituent in favour of the defendant and debited the defendant's account. The drafts were despatched to the defendant: and the history of the drafts ends there: their fate is not reported to the plaintiffs: and it is found later that when drafts drawn upon the constituents were about two years old and at the end of that period said by the defendant to have been dishonoured, no notice of any kind had been given to the plaintiffs by the defendant: nor has he ever produced the drafts.

The transactions which took place during the war appear to have been successful and though we have not got the half yearly accounts for that period it is probable that remittances were made by the plaintiffs to the defendant in respect of the half yearly balances. After the war prices fell, the goods were difficult to realise, and when realised did not clear the original draft. There became balances due, therefore, in respect of the "constituent" consignments. What happened in respect of what appears to be the first of these is significant. On 7th August, 1919, the plaintiffs write "we . . . enclose statement for your 1 bale of tanned hides ex s.s. 'Manora' and we carry forward the sum of £45 5s. 9d. to your debit in general account and if found correct please enter to conform. We also cover a letter to your constituent Mr. Esmailbhoj Sheriff including a statement dealing with his 10 bales of tanned skins ex s.s. 'Manora' showing a deficiency of £158 2s. 1d. for which amount we are issuing our draft in your favour. In the ordinary course of business routine we naturally are issuing to-day to the National Bank of India Ld. a Bill upon your goodself at three days sight for a similar amount and we leave our signature to the favour of your kind protection." And on 5th September, the defendant acknowledging the letter of 7th August, writes: "I have to inform you that I have accepted your draft for £158 2s. 1d., drawn on me through the National Bank of India, Ld. and the same has been fully paid to the said Bank on the 3rd inst. Please therefore you will credit my account with the said amount under the 3rd inst." In the "general account" for that half year the defendant is debited under 7th August: "Our

draft on E. Sheriff £158 2s. 1d.”: and is credited with the same sum “ 2nd October. Remittance £158 2s. 1d.”

In the first case therefore of a deficiency on a “ constituent ” account, the plaintiffs, while pursuing their practice of drawing upon either defendant or constituent in favour of the other, exact payment of the “ constituent ” debit from the defendant personally, which he accepts without demur. After this the plaintiffs appear to have been content with merely debiting the defendant in the general account with the draft drawn upon the constituent or in his favour: and the balances each half year arising partly from his own consignments and partly from constituent consignments are, of course, reduced by the “ constituent ” debits, and are accepted without demur.

By 1920 prices had fallen, there were consignments unrealised and the plaintiffs were becoming anxious. There is a series of letters pointing out that sums are due or will become due and pressing for payments either in liquidation of sums due or to reduce prospective liabilities. It would be significant enough if the case rested on the half yearly accounts above sent regularly, and showing the defendant debited with the “ constituent ” balances and accepted by the defendant without demur. But in two instances at least the plaintiffs expressly inform the defendant that he is liable for the “ constituents ”. Thus, on 22nd July, 1920, they write “ In referring to your liabilities you have failed to include the amounts which we have advanced from time to time tanned skins in connection with consignments influenced to us from your constituents, and, of course, it is needless for us to remind you that in all these cases you are absolutely responsible for any deficiencies ”. The answer is on 13th August. “ Your favour of 22nd ultimo to hand, the contents of which have been noted with attention.” If a business man notes with attention that he is said to be absolutely responsible for deficiencies and does not demur, what is the just inference? On 24th March, 1921, the plaintiffs sent an account purporting to show deficiencies which would arise on realisation of consignments, writing as follows: “ Finance. In accordance with our previous advices we are now enclosing copies of estimated net proceeds of all your consignments still on hand, as well as those of your constituents for whom, of course, you are financially entirely responsible.” The account shows an estimated debit of £1,427. There is no express acknowledgment of this unless the defendant’s letter of 14th April is such. “ Your favour by the last mail to hand and the contents noted with care and attention.” The plaintiffs keep pressing for a compliance with a request for a remittance to meet the situation disclosed by the account: and on 1st July, 1921, the defendant writes: “ Your favours to hand and the contents noted with attention. As regards your anxiety regarding the supposed deficiency in my accounts I may assure you that the same will be made up by my free shipments. Already some free shipments have been made in that direction of which you have already acknowledged receipt and more will be forwarded soon. And therefore I have to request you not to be

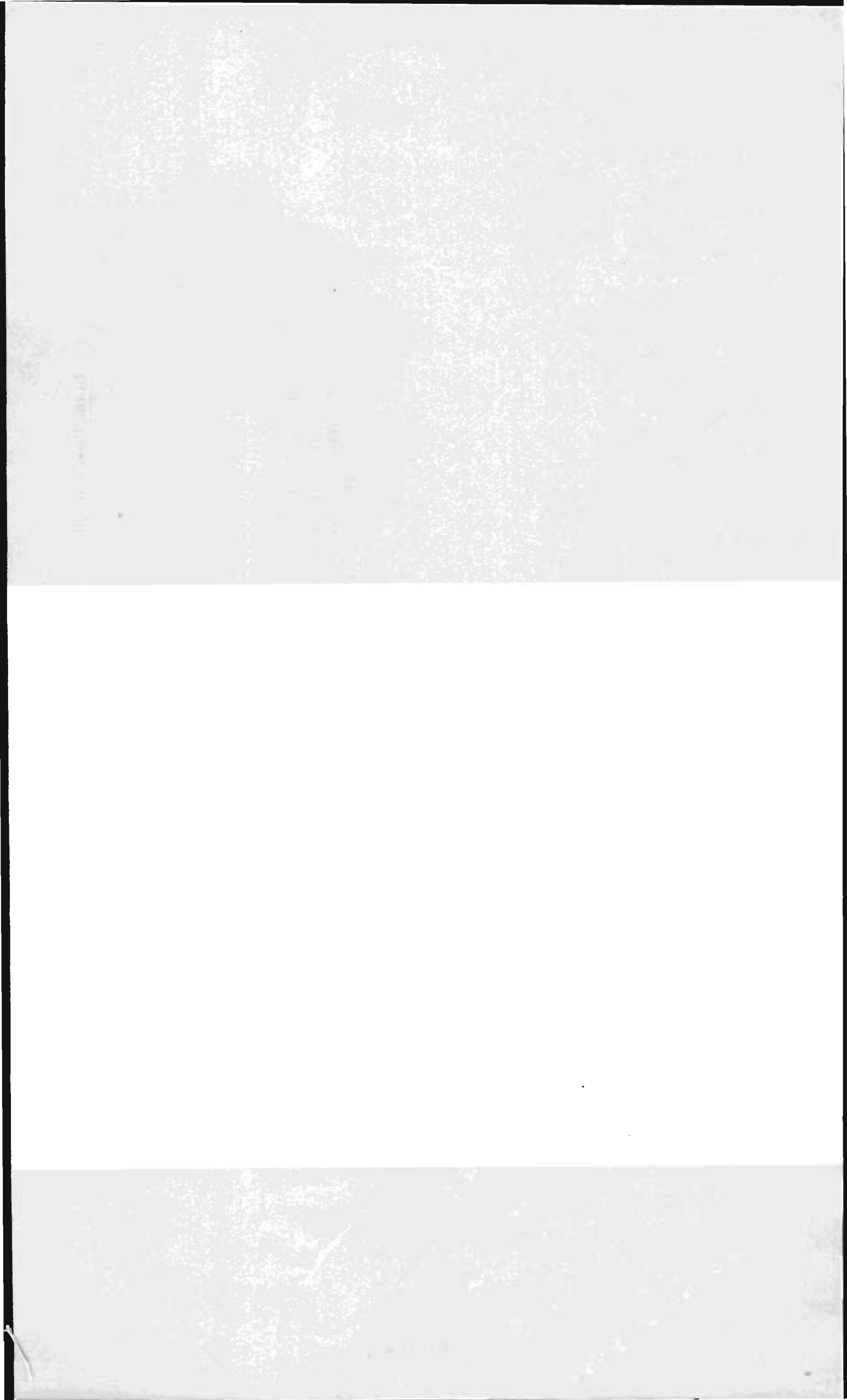
anxious about the matter. Having nothing further to add, yours faithfully."

There is further pressure by the plaintiffs: further promises by the defendant: and in fact a few small free consignments, i.e., consignments of goods unaccompanied by draft, by the sale of which the plaintiffs can reduce the indebtedness. Finally, on 9th November, 1923, the defendant writes: "As regards forcing your claim I may say that the whole account is covered by drafts drawn by you on various constituents such as Laduck & Co., Rehemtulla Abdulla & Co., and others which still remain unpaid to me. I have been doing everything in my power to recover the amount of these dishonoured drafts, but as you well know owing to bad times I have not as yet succeeded in my above efforts." There is not a scrap of evidence in the documents that the plaintiffs had been made aware of the fate of any of these drafts which appear in the half yearly account of December, 1921. Finally it is not till 19th December, 1923, that the defendant takes his courage in his hands and after stating that the amount of the dishonoured drafts more than covered the amount now demanded says, "I regret to state that I am not bound to pay nor am I liable for the same".

The result is that in respect of the business initiated and conducted as described the defendant is charged half yearly in account, and persistently by letters with liability for an amount which includes large constituent debits. He not only accepts the charges without demur but promises to send and does send goods to discharge the liability. In their Lordships' opinion it is impossible to differ from the conclusion of the trial Judge that the true inference from all the circumstances is that the parties agreed that the defendant was to be personally liable for losses on constituent consignments. They find it difficult to follow the reasoning of the judgments of the High Court in appeal so far as they confine the effect of the correspondence and documents to a supposed "estoppel". If the question be whether A has contracted a liability and being charged with it he does not demur but says I will send goods towards its discharge, the effect of A's action is not merely to make a representation on which an estoppel may be founded: but it is to afford the strongest possible evidence to establish the alleged liability.

The suggested explanation of the defendant's counsel that the drawing of drafts indicates that the defendant was merely acting as agent of the plaintiffs to collect or pay the balances due from or to the constituents entirely breaks down when the facts are examined. There is not any trace in the correspondence of the defendant acting in the capacity of an agent: no report to his supposed London principals: no account kept by the agent. If the defendant were indeed agent his conduct in respect of the drafts which for 18 months and more according to his story had been dishonoured without any notice to the principals would be inexcusable and inexplicable apart from exposing him to possible liabilities under law relating to bills of exchange. In the absence of any evidence of the

defendant or the constituents or of any documents passing between the defendant and his constituents their Lordships are satisfied that Kemp J. was fully justified in rejecting any such view of the defendant's position. It is not necessary to consider what contractual relations if any were established between the constituents and the plaintiffs. It is sufficient to say that in their Lordships' opinion it was clearly proved that as between the plaintiffs and the defendant business proceeded on the term that the defendant assumed responsibility for the debits resulting from the consignments in the constituents' name. In the result therefore this appeal should be allowed: the decree of the High Court in appeal should be set aside and the decree of Kemp J., dated 4th April, 1929, should be restored. The respondent must pay the costs of the appeal to the High Court and to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

WALTER SMITH, SINCE DECEASED
(NOW REPRESENTED BY JOHN
BAMFORD SMITH AND ANOTHER),
AND ANOTHER.

v.

AHMED ABDEENBHOY PEERBHOY

DELIVERED BY LORD ATKIN.

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