Privy Council Appeal No. 17 *of* 1961

Tay Kheng Hong – – – – – – – – *Appellant*

v.

Heap Eng Moh Steamship Co. Ltd. – – – – – *Respondents*

FROM

THE COURT OF APPEAL OF THE STATE OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1964

Present at the Hearing:

LORD JENKINS.

LORD MORRIS OF BORTH-Y-GEST.

LORD GUEST.

[*Delivered by* LORD GUEST]

This appeal is from a decision of the Court of Appeal of the State of Singapore allowing the respondents' appeal against the judgment of Ambrose J. in the High Court of Singapore awarding the appellant $30,711·60 by way of demurrage under a contract for the transhipment of cargoes of rice.

The appellant's evidence was that on 18th October 1958 he and Goh Leh acting on behalf of the respondents had made a verbal contract whereby the appellant was to act as the lighterage contractor of the respondents. Rates of payment for the appellant's services had been agreed, including demurrage of 60 cents per ton. It is common ground between the parties that the appellant transhipped cargoes of rice from two steamers, the " Planet " and the " Incharran " which had arrived at Singapore on 21st October and 27th November, 1958 respectively. These cargoes were ultimately bound for Indonesia on coastal steamers. The respondents paid the appellant $71,128·71 for lighterage, towing and stevedoring of these two cargoes.

Goh Leh gave evidence for the respondents denying that he had ever discussed rates and conditions of lighterage with the appellant. The respondents denied that any contract for lighterage had ever been made between them and the appellant.

In this state of the evidence Ambrose J. accepted the appellant's evidence that he and Goh Leh had made an agreement in the terms narrated. He saw no reason to disbelieve the appellant who was subjected to a severe cross-examination. The appellant, he said, impressed him as a simple, honest and straightforward witness. The trial Judge said he was satisfied that Goh Leh told a deliberate lie in saying he had no discussions with the appellant.

The Court of Appeal found that there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. Buttrose J. who delivered the judgment of the Court considered that Ambrose J. was plainly wrong in accepting the appellant's evidence.

It is apparent from an examination of the evidence that there is a direct conflict of evidence between the appellant and Goh Leh. The possibility of a misunderstanding is eliminated by the fact that Goh Leh denied having any discussion with the appellant about lighterage. One or other of these two witnesses must be lying. The trial Judge who saw and heard the witnesses has reached the conclusion that it was Goh Leh who was untruthful and that the appellant was telling the truth.

There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] A.C. 484 at page 487 " I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfield that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court." Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co. Ltd.* [1919] S.C. (H.L.) 35 at page 37. " In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment." Before the Court of Appeal in Singapore was entitled to reject the trial Judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial Judge's view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

Before dealing with the judgment of the Court of Appeal it is necessary to dispose of a point, not taken so far as appears from the judgment before the Court of Appeal, but argued by the respondents' counsel before the Board. He suggested that by reason of inconsistencies and discrepancies in the appellant's evidence the trial Judge ought not to have accepted him as a credible witness. Without elaborating the criticisms made by respondents' counsel it is sufficient to say that their Lordships are not satisfied that any of these inconsistencies were of a material character or that taken either individually or collectively they indicated that the appellant was not an honest witness. The appellant's memory on occasions may have been at fault, but any minor inconsistencies there may have been appeared on the face of the appellant's evidence and these are the very matters which the trial Judge must have taken into account when assessing the credibility of the witness's evidence.

Before returning to the judgment of the Court of Appeal it will be convenient to narrate the appellant's and respondents' evidence in some detail.

The appellant is a lighterage contractor in Singapore having been on his own from May 1958. He was introduced to the respondents by one Khoo and he met Goh Leh the respondents' shipping manager on a date which was probably October 18th 1958. He gave a detailed account of the discussion as to lighterage during which terms were agreed between him and Goh Leh for lighterage charges including 60 cents per ton for demurrage. Khoo and an Indonesian were present at the meeting. The first vessel the " Planet " came in on 21st October 1958 and he carried out the work from 22nd October on this vessel and subsequently on the " Incharran " which arrived on 27th November. Demurrage arose on these cargoes because ships were not available for Indonesia when the incoming ships arrived. He drew up the bills for demurrage and signed them and left them at the respondents' office, one in November 1958, one in January 1959 and one in March 1959. These bills have not been paid. The accounts for lighterage on the " Planet " and the " Incharran " have been paid by the respondents. The bills on the " Planet " were all paid by 12th December and the bills on the " Incharran "

by 16th December 1958. On two of the bills, one for the " Planet " and one for the " Incharran " rendered by the appellant to the respondents for lighterage charges appear the words " Free Demurrage ". The appellant who did not understand English explained that he asked Khoo to give the appellant's typist the draft to type. The trial Judge accepted the typist's evidence that she typed these words on the bills on the instructions of Khoo and that the appellant was not aware that these words were on the bills when he signed them. Khoo who occupied an office in the same building as the appellant was paid a commission of 20 cents per ton in consideration of his recommendation of the appellant to the respondents.

There was no corroboration of the appellant's evidence of the agreement between him and Goh Leh. Other lighterage contractors, however, gave evidence that they have never heard of free demurrage and that demurrage was bound to arise on such lighterage contracts.

In his evidence for the respondents Goh Leh, their shipping manager said that his company only handled the husbanding in relation to the " Planet " and the " Incharran ". The stevedoring, lighterage and on carriage were in the hands of Khoo of the South Sumatra Shipping Co. on behalf of the Indonesia Sugar Line and the Indonesia Samudera Line. He produced a memorandum undated and unsigned which he said contained the instructions given to him by his managing director, Mr. Haalebos. These were that his company were to act as husbanding agents for the " Planet ", and that Khoo had arranged with Mr. Aus Suriatna of the Indonesia Samudera Line and the Indonesia Sugar Line for the discharge of rice into lighters and for the on carriage. He denied taking part in any discussions with the appellant or Khoo or Suriatna in regard to lighterage charges. He first met the appellant on 21st October on a motor launch proceeding to the " Planet ". He says that Khoo gave him to understand that there would be no demurrage charges and he further stated that the demurrage bills were never presented to him for payment by the appellant. Khoo was making a profit of $4 per ton on the on freight of $18. The first he knew of these bills was when they were rendered to the respondents by the appellant's solicitor in January 1959.

The Court of Appeal found that the trial Judge's view of the appellant's evidence could not be accepted having regard to certain documents which they considered supported the evidence of Goh Leh and were consistent only with the respondents' case.

A number of the documents to which the Court of Appeal referred were said to be documents which were inadmissible in evidence as being hearsay but which had been tendered by the respondents at the trial without objection by the appellant. The appellant's counsel submitted to the Board that as these documents were inadmissible as hearsay evidence, the Court of Appeal were not entitled to place any reliance on them. Reference was made to *Jacker v. International Cable Company Limited* (1888) 5 T.L.R. 13. The mere failure of a party to object to evidence tendered cannot convert inadmissible evidence into legal evidence, but a party may by his conduct at the trial be precluded from objecting to such evidence (*Gilbert v. Endean* (1878) 9 Ch.D. 259). In the circumstances of the present case their Lordships feel unable to say that the documents to which objection was taken before the Board were not material to which the Court of Appeal was entitled to have regard.

The documents particularly relied upon by the Court of Appeal were the undated and unsigned memorandum by Mr. Haalebos to Goh Leh already referred to and a letter dated 29th October 1958 from the respondents to Aus Suriatna in which the respondents part in the handling of the " Planet " was confirmed. These documents afforded some support to the respondents' case that a contract had been made between the respondents and the owners in regard to the handling of the cargo, but they are by no means inconsistent with a contract having been made between Goh Leh for the respondents and the appellant or with some private arrangement between Goh Leh and the appellant on the terms stated by the latter.

The Court of Appeal also placed reliance on the evidence of Mr. Lambert and Tan Yat Chin as being consistent only with the respondents' case.

Mr. Lambert of the Barretto Shipping & Trading Co. said he was approached by Mr. Aus Suriatna of the Indonesia Sugar Line and the Indonesia Samudera Line to handle the cargo of rice from the " Planet ". However, owing to the fact that his company was not put in funds by the owners before the arrival of the " Planet " nothing came of the matter. This had no possible bearing on any subsequent arrangement between the appellant and Goh Leh. Tan Yat Chin who worked for the appellant as a clerk on the " Planet " and " Incharran " spoke to having discussed tally clerks on board the ship with Goh Leh. He rendered his bills to and was paid by the respondents. So far from this witness's evidence being consistent only with the respondents' case, it appears to their Lordships to give some support to the appellant's evidence that Goh Leh did concern himself with the lighterage contract contrary to his own evidence.

Respondents' counsel presented an elaborate reconstruction of the history of the case in which Khoo prominently figured as the villain of the piece. He was not disposed to argue that Khoo did not make a contract with the appellant for the lighterage in regard to both vessels, a contract which, he conceded, probably included demurrage. He proceeded, however, to suggest that Khoo had deceived the respondents into thinking that the contract was " Free Demurrage " by having these words typed in after the appellant had signed the bills. His motive in doing so is not clear, but it may have been to retain his profit on the on carriage. If this, however, is what happened and Khoo was acting on behalf of the owners in employing the appellant it is difficult to understand why the appellant did not sue Khoo and/or the owners. He would have had a stronger case against these defendants as he would have obtained corroboration from the bill heads which included the names of the owners. The explanation suggested for his not suing the owners that the companies were registered in Indonesia is not convincing. This reconstruction of the history is however in the absence of Khoo from the witness-box pure speculation. No criticism can certainly be made of the appellant for his failure to call Khoo as a witness, if he had as suggested swindled the appellant.

A number of difficulties undoubtedly arise on the presentation of the case both from the appellant's and the respondents' point of view. It may be that the whole truth has not been disclosed. But in that state of affairs with two possible explanations, the safest course is in their Lordships' view to accept the trial Judge's estimate of the credibility of the two witnesses, the appellant and Goh Leh. If this be the correct view, it becomes necessary to consider how far the appellant's evidence will carry him.

The conclusion arrived at by the Court of Appeal was to a large extent based on the view that they were entitled to interfere with the trial Judge's findings because these were inferences drawn from the facts rather than the findings of specific facts. An appellate tribunal will more readily interfere with the trial Judge's decision on the former than on the latter (see *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370). In so far, however, as the trial Judge's decision was based on the credibility of the appellant and Goh Leh this was the finding of a specific fact that an agreement was reached between them, thus depending on the evaluation of their evidence as witnesses. It may be that the Court of Appeal's acceptance of the evidence of Goh Leh depended on inferences from documents, but these inferences are not sufficient in their Lordships' opinion to reinstate Goh Leh as a reliable witness in face of the trial Judge's deliberate refusal to accept this evidence as truthful. If the appellant is an honest witness whose evidence must be accepted, this would establish that a contract was made between him and Goh Leh for lighterage charges which included demurrage. Respondents' counsel conceded that in these circumstances the personal liability of the respondents was involved.

Upon the whole matter their Lordships have reached the conclusion that there was not sufficient material before the Court of Appeal to entitle them to reject the result arrived at by the trial Judge.

They will accordingly report to the Head of Malaysia their opinion that the appeal should be allowed with costs in the Court of Appeal and the judgment of Ambrose J. dated 28th May 1960 restored, and that the respondents should pay the costs of this appeal. The appellant having been granted leave to prosecute his appeal *in forma pauperis* these costs should be taxed upon the pauper scale.

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In the Privy Council

TAY KHENG HONG

v.

HEAP ENG MOH STEAMSHIP CO., LTD.

DELIVERED BY
LORD GUEST

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