PRIVY COUNCIL.

J.C.* 1929

June 4.

NETHERLANDSCHE HANDEL MAATSCHAPPIJ

v.

R.M.P. CHETTIAR FIRM AND OTHERS.

(On Appeal from the High Court at Rangoon.)

Evidence—Issue of fact—Finding by trial Judge—Reliance not placed on demeanour of witnesses—Weight of finding on appeal.

Decree of the High Court based on an issue of fact reversed—because there appeared to be no safe ground for differing from the finding of the trial Judge, who had seen and heard the witnesses except one whose evidence was taken on commission; the fact that the trial Judge did not express his reliance upon the demeanour of the witnesses did not detract from the weight to be given to his finding.

Appeal (No. 89 of 1928) from a decree of the High Court (Rutledge, C.J., and Mya Bu, J.) dated May 9, 1927, reversing a decree made by that Court (Das, J.) in its original jurisdiction.

The suit was instituted in the High Court by the appellants who claimed Rs. 10,000 from the first respondent firm as debtor, and from the second respondent given as guarantors. The only issue was whether the first respondent firm had delivered to the appellants, to be placed to their account with them, a currency note for Rs. 10,000.

The nature of the evidence at the trial appears from the judgment of the Judicial Committee.

The trial Judge (Das, J.) found that the currency note had not been delivered by the first respondent's agent, but that finding was reversed on appeal by Rutledge, C.J., and Mya Bu, J.

1929, *March* 4, 5, 18, 19. *Hon. Geoffery Lawrence, K.C.*, and *Leach* for the appellants.

Dunne, K.C., and *E. B. Raikes* for the respondents.

* PRESENT:—LORD CARSON, LORD ATKIN, and Sir GEORGE LOWNDES.

The arguments were upon the facts as appearing in the evidence; the appellants referred however to *Bombay Cotton Manufacturing Company* v. *Motilal Shivlal* (1).

June 4. The judgment of their Lordships was delivered by—

LORD CARSON.—The appellant (a bank incorporated under the laws of Holland) as plaintiff brought an action against the respondents as defendants to recover the sum of Rs. 10,382-4-3 as principal and interest due from the first respondent on a cash credit account and from the second respondent on a letter of guarantee and as money due from both respondents on a promissory note.

By their written statement the respondents alleged that the appellant had failed to give credit for a sum of Rs. 10,000 paid into the said account on the 29th December 1914, by one Shammugam Chettiar, an assistant in the employ of the first respondent firm which it was alleged was received by one Ong Eng Tang, a receiving cashier in the employ of the appellant. The only issue raised in the present suit and in this appeal is one of fact, viz., whether the first respondent paid to the appellant Rs. 10,000, as alleged, in cash on the 29th December 1924?

The action was tried by Das, J., in the High Court of Judicature at Rangoon, original civil jurisdiction, who by his judgment dated the 9th March 1926, held that the first respondent firm did not pay the sum of Rs. 10,000 to the appellant on the 29th December 1924, as alleged, and he accordingly granted a decree in favour of the appellant, with costs. On appeal from the decree of Das, J., the High Court (appellate civil jurisdiction) came to a different

(1) (1915) I.L.R. 39 Bom. 386; L.R. 42 I.A. 110.

1929

NETHERLANDSCHE HANDEL MAATSCHAPPIJ v. R.M.P. CHETTIAR FIRM.

conclusion, allowed the appeal and dismissed the appellant's suit with costs. Hence the present appeal. Now, the question to be determined entirely depends on whether the appellate Court was right in holding that the trial Judge had erred in disbelieving the story told by Shammugam, supported as it was by one Sathappa Chettiar (taken on commission), a clerk in the employment of a Rangoon firm, and one Naina Mohamed Rowther, a Chulia or Mohammedan from the Madras Presidency, and who appears to have been the owner of a rope factory. It is not disputed that there is no entry of the payment alleged in any book of the bank, nor has the first respondent got any written acknowledgment of the amount having been received. The absence of any such entry or the failure to produce any written acknowledgment is, of course, consistent with either view, viz., (1) that the sum in question was never paid to the cashier, or (2) that, having been so paid, it was retained by the cashier or some other member of the staff and converted to his own use, in which case one would not expect to find any record of the transaction in the books of the appellant.

The case, therefore, has to be decided almost if not entirely, on the credibility of the three witnesses named, and the appellate Court very properly recognizes and expresses the difficulty such a case presents of differing from the conclusions of fact arrived at by the trial Judge, who had the witnesses before him, with the exception of Sathappa, whose evidence was taken on commission.

It is not disputed that on the 29th December 1924, the first respondent sent Shammugam, their chief assistant, to pay in Rs. 20,000 to the bank. This amount was made up of cheques for Rs. 10,000 and Rs. 10,000 in cash, which consisted of ninety

one-hundred rupee notes and one one-thousand rupee note. Apparently the practice was to enter cheques for paying in and cash in different slip books, which were handed in with the cheques or cash respectively at different counters. As the slip book accompanying a cash payment had to go through several hands before the slip would be detached and the entries on the counterfoil completed, persons who made such payments were in the habit of leaving without receiving back their slip books, and the bank when the entries were completed used to put them in a cupboard, from which their owners took them at their convenience. Now the story of Shammugam as given in evidence is that he went to the receiving cashier, Ong Eng Tang, that before he tendered the notes and while he was standing with his hand over the notes over the book, Sathappa arrived with a Rs. 10,000 note and asked the cashier for change. He says that at that time the cashier did not know what amount he was going to pay in, that when Sathappa spoke to the cashier in some language that he did not understand and the cashier had replied, Sathappa came to him and said that the cashier had directed him to get change from him (Shammugam), and as it turned out that he had the exact amount which Sathappa required, he handed over to him the Rs. 10,000 in notes and got the one Rs. 10,000 note. He also says that when he received the Rs. 10,000 note from Sathappa he asked the latter to note his mark on the back of the note, but at Sathappa's request he himself wrote on the note G.K.R.S.K.R., being Sathappa's firm's initials. He also says he noted down the number of the notes on a small slip of paper and put down the mark and stripe of Sathappa's firm on it. It is to be noted that, although this exchange was, according to the evidence, being conducted in the presence of and,

1929

NETHERLANDSCHE HANDEL MAATSCHAPPIJ v. R.M.P. CHETTIAR FIRM.

at the request of the cashier, who was about to receive the note, Shammugam suggests that he took these precautions in order to know from whom it was received and to be able to trace it if it was lost. "I thought," he said, "that if they denied receiving that note, unless I got the number, I would not be able to say that I had had it." He did not, however, make any note of the numbers of the notes given in exchange and he said it was not his practice to take down the numbers of the notes he was paying in. He states that he handed the note with the paying-in book to the cashier, Ong Eng Tang. Sathappa confirms the evidence of Shammugam as to the changing of the note and says that at the time of his leaving the bank Shammugam was standing before the counter tendering the deposit book with the note. Another witness was Naina Mahomed Rowther, who appears to have had some dealings with the first defendant's firm) and he alleged that he went to the bank on the day in question, and that when he was coming out he saw the exchange of notes and professes to have heard some of the conversation and to have seen Shammugam put the note inside a book and give it to the cashier. The witness does not appear to have dealt with or to have had any business with the bank nor does he seem to have transacted any business in the bank with Shammugam or afterwards. The learned trial Judge states he was not very much impressed with his evidence, and the appellate Court state that they are in agreement with the trial Judge on this point, and state their reasons.

Now the trial Judge disbelieved the whole of this story, which was denied by Ong Eng Tang. In the first place, it is found by the trial Judge and not questioned that receiving cashiers are not allowed to change notes at all, and Sathappa himself says it is not the custom to go to the cashier of the bank for

changing notes, and, as the trial Judge observes, that Sathappa should have come to the bank to change the ten-thousand rupee note is difficult to understand, as he could easily have gone to the currency office if he wanted the note to be changed, and not to the bank. It is also pointed out that it is difficult to believe that Ong Eng Tang, the cashier, who could not on the evidence have known that Shammugam had notes for Rs. 10,000, suggested the exchange as alleged, and that by a coincidence Shammugam gives him the exact sum which Sathappa required. There is no doubt that the Rs. 10,000 note was cashed at the currency office on the 30th December, and when produced it bore on the back the initials of the first defendant firm and the initials of Sathappa's firm—both of which had been put on by Shammugam. But, in addition, the note on the face of it bore in pencil the words "Netherlands Bank," and the suggestion seems to be that Ong Eng Tang or some bank official must have put these words on to facilitate the changing of the note. This is a matter of some importance, and it is to be regretted that no effort seems to have been made to identify the handwriting of these words when the note was produced and before it was unfortunately destroyed. It is, however, not suggested that any bank puts its name on notes for the purpose of changing or that any questions are asked at the currency office which would necessitate such a statement on the note. When, therefore, it is alleged, and it is really the only alternative, that Ong Eng Tang stole the note, it is certainly a matter for serious consideration whether (1) he would have selected for theft a note the exchange of which took place in the presence of three witnesses ; (2) which bore on the face of it the initials already referred to, and (3) which was easily identified as coming from the

1929

NETHERLANDSCHE HANDEL MAATSCHAPPIJ v. R.M.P. CHETTIAR FIRM.

Netherlands Bank by the words put upon it for the purpose of completing the theft. It is, however, true that Rajabahadur, a teller of the curreney office, swears that he remembers that one Basdeo, a dhurwan of the plaintiff bank, cashed this ten-thousand rupee note, the inference being that he was taken into the confidence of Ong Eng to enable him to carry out the theft. This is denied by Basdeo, and one finds it difficult to believe that the cashier should ever have placed himself in the power of one of the servants of the bank. It is much more likely, as suggested by the trial Judge, that Rajabahadur, seeing the words " Netherlands Bank " on the face of the note, thought that it must have been cashed by a dhurwan of the bank, especially as admittedly Basdeo had been at the bank to change small notes into new ones. It is pointed out that on the date in question 72 ten-thousand rupee notes were cashed at the currency office, and the witness is unable to remember any other person who cashed any of these notes.

Their Lordships have gone in some detail into the circumstances with a view to showing in the first place that the learned trial Judge had not omitted any of the crucial points which ought to have been present to his mind in coming to a conclusion, and also in the second place that there was and is a very strong and logical case put forward against the probability of the truth of the story presented by Shammugam and his two witnesses. That being so, their Lordships think that this is a case in which it cannot be said that the trial Judge has not had an advantage over an appellate Court in seeing the various witnesses (with the exception of Sathappa) and their Lordships do not think it detracts from such advantage (as the appellate Court seems to think) that the learned trial Judge has not expressed his reliance upon the

demeanour of the witnesses. It is perfectly clear that he did not believe the story put forward by Shammugam, supported by Sathappa and Naina, and it was inevitable that he should have been influenced in his judgment by the view he formed of the credibility of the witnesses as they were examined before him.

1929

NETHERLANDSCHE HANDEL MAATSCHAPPIJ v. R.M.P. CHETTIAR FIRM.

Their Lordships therefore are of opinion that there is no safe ground for differing from the conclusions of the trial Judge under all the circumstances, and they will humbly advise His Majesty that this appeal should be allowed, that the judgment of Das, J., and the decree dated the 9th March 1926, should be restored, and that the respondents should pay to the appellants both the costs of the appeal in the High Court of Judicature at Rangoon and of this appeal.

Solicitors for appellants : *Cutler, Allingham & Ford.*
Solicitors for respondents : *Bramall & Bramall.*

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

THE BURMA OIL COMPANY, LTD.

v.

MA TIN AND OTHERS.*

1929

Apl. 11.

Civil Procedure Code (Act V of 1908), O. 21, rr. 18, 20—Cross decrees for money—Distinction between decree for money with personal remedy and without personal remedy—Decree for sale of property in enforcement of mortgage when a decree for payment of money under rule 18, and when not—Decree for sale of mortgage property without personal decree not a decree for sale in enforcement of a mortgage under rules 18 and 20.

A mortgage decree for the sale of the mortgaged property, while there is no remedy except against the property and where there is no obligation on the part of the mortgagor personally to pay any sum of money, is not a decree for

* Civil First Appeal No. 26 of 1929 from the order of the District Court of Magwe in Civil Execution No. 13 of 1928.